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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 472.

WILLIAM L. CURTIN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 9, 1914.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1914.

UNITED STATES OF AMERICA, *ss:*

President of the United States of America to the Judges of the istrict Court of the United States for the Southern District of ew York, Greeting:

ecause, in the record and proceedings, as also in the rendition he judgment of a plea which is in the said District Court, before or some of you, in the matter of an alleged contempt of court William L. Curtin, between William L. Curtin, plaintiff-in- r, and United States of America, defendant-in-error, a manifest hath happened, to the great damage of the said William L. in, as is said and appears by his complaint.

e, being willing that such error, if any hath been, should be corrected, and full and speedy justice done to the parties afore- in this behalf.

command you, if judgment be therein given, that then under seal, distinctly and openly, you send the record and proceed- aforesaid, with all things concerning the same, to the Justices e Supreme Court of the United States, at the Capitol in the city ashington, D. C., together with this writ, so that you have the at the said place before the Justices aforesaid, on the 20th day ay, 1914, that the record and proceedings aforesaid being in- spected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United s ought to be done.

itness, the Honorable Edward Douglass White, Chief Justice e United States, this 20th day of April, in the year of our Lord housand nine hundred and fourteen, and of the Independence e United States the one hundred and thirty eighth.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

e foregoing writ is hereby allowed.

LEARNED HAND,
U. S. District Judge.

iled April 21, 1914.)

3 The District Court of the United States of America for the Southern District of New York.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City of New York, within and for the District aforesaid, on the first Tuesday of March, in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 16th day of April, in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America, within and for the District aforesaid, on their oath make presentment to this Court, stating that on the 30th day of March, in the year of our Lord one thousand nine hundred and fourteen, in the course of an investigation that the Grand Jurors were then making into certain alleged violations of Sec. 37 and Sec. 39 of the Criminal Code of the United States, William L. Curtin appeared before the said Grand Jurors in compliance with a subpœna served upon him, directing him to testify and give evidence in regard to an alleged violation of § 37 and § 39 of the Criminal Code of the United States; that the said William L. Curtin, after being duly sworn, testified as follows:

4 Before a Quorum of the Grand Jury.

In the Matter of JOHN DOE and RICHARD ROE.

NEW YORK, p. m., March 30, 1914.

WILLIAM L. CURTIN, sworn and examined.

By Mr. CARSTARPHEN:

Q. What is your name?
A. William L. Curtin.
Q. Where do you reside?
A. 1342 East Eighteenth St.
Q. Were you employed with the New York Tribune on the 19th day of December, 1913, and during the month of December, 1913, and if so, in what capacity?
A. I was, as reporter.
Q. You are aware, are you not, that in a proceeding in the United States District Court for the Southern District of New York, in the matter of William L. Curtin, which came up upon the presentment of the Grand Jury of the United States for the Southern District of New York of William L. Curtin for contempt for refusing to answer questions regarding the sources of his information which was the basis of certain articles in the New York Tribune of December 19, 1913, and December 31, 1913, regarding Customs frauds, said presentment having been made on the 18th day of February, 1914,

that on the 27th day of February, 1914, Hon. Learned Hand, the District Judge before whom the presentment was made, passed an order, "In the matter of William L. Curtin, a witness held in contempt of Court by the Grand Jurors of the United States for the Southern District of New York," wherein he, "ordered that the respondent, William L. Curtin, is in contempt, and that he pay a fine of $500, with leave to said respondent to purge himself by appearing on notice before the present or any subsequent Grand Jury, and testifying fully as to the sources of his information which was the basis of said certain articles in the New York Tribune regarding Customs frauds, and in the event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply"? I am asking you if you are aware of all these things?

A. Yes, yes, I am.

Q. Do you appear before this Grand Jury this afternoon, pursuant to a subpœna dated the 27th day of March, 1914,—have you got it there?

A. Yes, sir.

Q. (Continuing:) Addressed to you and directing you to appear and attend for the grand inquest of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York on the 30th day of March, 1914, at three o'clock in the afternoon, to testify and give evidence in regard to an alleged violation of sections 37 and 39, Criminal Code of the United States, on the part of the United States?

A. Yes, sir.

5 Q. The United States Marshal has made the following return upon the original of this subpœna: "Service of a copy of the within subpœna admitted this 28th day of March, 1914. Henry A. Wise." Was Henry A. Wise authorized by you to accept service of this subpœna, and did he deliver a copy of said subpœna to you or communicate the contents of the subpœna to you?

A. He did—well, Mr. Whitney did.

Q. I wish to inform you that I was notified by Mr. Henry A. Wise, who stated that he acted as your counsel, that if I would instruct the United States Marshal to have a Deputy Marshal call at Mr. Wise's office with a copy of the subpœna and deliver the subpœna to Mr. Wise, that he would communicate with you and that you would appear at three o'clock at the session of the Grand Jury today, and that neither you nor he, as your counsel, would raise any technical question as to the notice called for and mentioned in Judge Hand's order. Is that your understanding of the matter, and do you now admit that you have received notice of the entry of Judge Hand's order as aforesaid, and notice to appear today before this Grand Jury?

A. Yes, sir.

Q. Mr. Curtin, as you were informed when you appeared before the Grand Jury on the afternoon of February 18th, 1914, the President of the United States has granted you a full and uncon-

ditional pardon for all offenses against the United States which you have committed, or may have committed, or taken part in, in connection with the securing, writing about or assisting in the publication of the information incorporated in an article which appeared in the issue of the New York Tribune on December 19th, 1913, and in connection with any other article, matter or thing concerning which you might be interrogated before the Federal Grand Jury in the proceeding entitled, "United States vs. John Doe and Richard Roe." You were at that time tendered or offered this warrant of pardon which you took in your hand and which you read aloud. You thereafter left the Grand Jury room but did not take with you the warrant of pardon, and, in fact, declined to do so. I now wish to inform you that this warrant of pardon was placed in the custody of the Foreman of the Grand Jury, and that it was by him handed to the Judge holding Court at the time when the presentment was made to the Grand Jury on February 19, 1914, and was thereafter turned over to the Clerk of the United States District Court for the Southern District of New York, by whom it has since been held, and from a file in his office, I today produce this warrant of pardon.

I furthermore desire to inform you that this warrant of pardon has not been revoked and is still outstanding. You will please take the warrant of pardon which I now hand you, examine it, and satisfy yourself that it is the same warrant of pardon that was handed to you when you appeared before the Grand Jury February 18th, 1914, and I wish to inform you, as a representative of the Department of Justice, through whom this warrant of pardon was transmitted to H. Snowden Marshal, United States Attorney for this district, and whose assistant I am, that you are hereby freely and unreservedly tendered this warrant of pardon which is a free and unconditional pardon (handing pardon to witness).

A. Mr. Carstarphen, I respectfully decline to take that pardon and from a file in his office, I today produce this warrant of pardon in my hand unless you ask me to do it.

6 Q. I have only asked you, Mr. Curtin, to examine it to see if it is, in fact, the same warrant of pardon that was handed you when you were last before the Grand Jury.

A. Well, I wouldn't be able to identify it, that is, I couldn't recall the wording of it to that extent, because I read it over once aloud to the Grand Jury.

Q. In this connection, I have no objection at all to your putting the warrant of pardon down on the table again after you've read it. I simply want to know if you are satisfied that it is the same warrant of pardon.

A. May I assume and take your word for it that it is the same warrant?

Q. Suppose you take it out and show it to your counsel.

A. May I go out and ask him about it?

Q. Surely.

(Witness leaves the room without the pardon in his physical possession.)

(Witness returns.)

A. Mr. Whitney says that I have his permission to identify it if I can, but I have no way that I know of, unless it be by thumbmarks; I did not take any mental impression of it.

Q. Just look at it without touching it, if you wish?

A. I don't want to appear ridiculous here; I will tell you, I remember reading it aloud and I remember the word, middle initial, "I" instead of "L" and I see that it is the same there. (Indicating pardon), and I did not recognize the signature of Mr. Wilson there, that is one thing I did not notice, but I see it is on there. (Indicating pardon.)

Q. But you have no doubt whatever, Mr. Curtin, that that is the same warrant of pardon?

A. I remember the name of Mr. McReynolds on there, but I did not see Woodrow Wilson's on there (Indicating Pardon).

Q. Now, Mr. Curtin, inasmuch as you have declined to take the warrant in your physical possession, you will observe that I have laid it here on the table before you, within reach of your hand, and that you are absolutely at liberty to take it before I ask you any questions this afternoon, or while I am asking you any questions, or after I have asked you any questions, and should you not take the warrant of pardon with you when you leave the Grand Jury room this afternoon, I will return it to the Clerk of the United States District Court for the Southern District of New York, in whose custody it will remain, subject to your calling for it or taking it at any time in the future that you may want it.

A. Yes, sir.

Q. Do you wish to accept this warrant of pardon?

A. No, sir.

Q. It is freely and unreservedly tendered to you.

A. No, sir, I do not.

7 Q. Have you read Judge Learned Hand's opinion that was passed in connection with this case after the contempt proceedings?

A. Most carefully.

Q. You remember, in a general way, the questions which were asked of you the last time you appeared before a Grand Jury, and which you refused to answer on the ground that they might tend to incriminate you?

A. Oh, in a general way, yes, I think I do.

Q. Judge Hand has said in the concluding clause of the order, that he entered that you were in contempt for refusing to answer those questions and should pay a fine, and he granted you leave to purge yourself by appearing on notice and testifying fully as to the source of your information which was the basis of certain articles appearing in the New York Tribune regarding Customs frauds, and, in the event that you failed to answer, a commitment would issue. Now, do you wish to purge yourself of contempt and to answer these questions?

A. No, I do not.

Q. I am now going to read to you from the record the last time you appeared before a Grand Jury in connection with this matter,

many of the questions that were asked you before, in practically the same language that they were asked, and ask you to answer each question as I read it to you. (Reading:) "I show you a copy of the New York Tribune dated December 19, 1913, and direct your attention to an article headed, "Plan Fight for Millions Saved by Duty Dodging," the first words of the article being, "Robert T. Heitemeyer of Hoboken," and the article ending on the second page with the words, "in favor of Mrs. Leeds." I ask you to examine the copy of the paper which I hand you.

A. I have seen it, yes.

Q. And have read that article?

A. I have read the article.

Q. That is the paper that was marked for identification as Exhibit "One" at the February 18th hearing, and which I will have remarked Exhibit "B."

(Warrant of pardon marked Exhibit "A," and copy of the New York Tribune dated December, 1913, marked Exhibit "B."

Q. Did you write the entire article to which I have referred, with the exception of the headlines?

A. Yes, sir, I did.

Q. And you have so testified before?

A. I have so testified before, yes.

Q. Was the article written by you on a typewriting machine in the office of the New York Tribune on December 18th, 1913?

A. That is the day, Mr. Carstarphen, that that article was made? Yes, the day before.

Q. From what source or sources, person or persons, and in what manner, did you obtain the information you incorporated in the article which you have testified was written by you?

A. I decline to answer on the ground that it might tend to incriminate me, as I stated before.

8 Q. Will you state on what grounds you decline to answer?

A. I decline to answer on the ground that I believe it will tend to incriminate me.

Q. This warrant of pardon, Mr. Curtin, which you have examined, and which is the same warrant of pardon that you were shown previously, means and is intended to absolve you from any offenses you have committed or may have committed, or taken part in, in connection with the securing, writing about or assisting in the publication of the information incorporated in the article referred to, and in connection with any other article, matter or thing concerning which you may be interrogated before the United States Grand Jury, under the sections referred to — the supœna directed to you, and concerning which you are now asked to testify. You have just stated that to answer the two or three questions I have asked you that you have not answered, would tend to incriminate you and that you decline to answer them for that reason. Now, upon the strength of your so testifying at a previous hearing before another Grand Jury, this warrant of pardon was obtained for you. It bears the signature of the President of the United States, Woodrow Wilson, and the signa-

ture of J. C. McReynolds, the Attorney General of the United States, and as I then notified you, I tell you now that it came to the United States Attorney, to New York City, and, through him, to me, to be offered to you as a document coming through the proper and general course from those officials; that this warrant of pardon grants you a full, complete and unconditional pardon for any offenses or any crime you could possibly have committed, in connection with the article or from whatever source you may have obtained it. It is just as complete as it was possible for it to be made, and I say to you now that if you did believe, when you refused to answer the questions the other time, and if you believe now that to answer those questions, as to the source from which you got that information, would incriminate you, that this pardon absolves you. If you did believe it before—that it would tend to incriminate you—and if you believe it now, I inform you that you have been offered a pardon that absolves you from any offenses, pardons you from any offenses which you have committed against the United States on account of anything that you did in connection with the publication of that article, and I am now asking you, in view of the fact that that pardon has been presented to you, and been again read by you, and explained to you, if you will tell this Grand Jury from what source or sources, person or persons, and in what manner, you obtained the information you incorporated in this article which you have testified was written by you.

A. With all due respect to the learned district attorney and the Honorable Grand Jury, I still decline to answer on the ground that I believe, still, it would tend to incriminate me.

Q. Now, I ask you again, from what source or sources, person or persons, and in what manner you obtained the information upon which you based that part of the article written by you with reference to Tiffany & Company and to supposed interviews between Tiffany & Company and the Customs officials?

A. I decline to answer on the ground that it would tend to incriminate me.

Q. Do you honestly believe that the answer to that question might tend to incriminate you?

9

A. I do.

Q. Do you so state, notwithstanding all that has been told you in regard to this warrant of pardon and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Did you get such information or any information in regard to this matter from any official or employe or person in any way connected with the office of the Collector of the Port of New York, the Surveyor of Customs at the Port of New York, from the Special Agents of the Treasury Department at the Port of New York or the Appraiser's Stores at the Port of New York, or any person, employe or anyone connected with the Treasury Department or any employe of the United States Government whatsoever, or under the direction and control of the United States Government?

A. Same answer.

Q. Just give it each time.

A. I decline to answer because I believe it will tend to incriminate me.

Q. Do you honestly and truly believe that the answer to that question would tend to incriminate you?

A. I do.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon and all that you have learned in regard to this pardon and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Did you get such or any information from any person not an employe of any of the different offices or departments that I have mentioned in the previous question, but who told you that he, she or they, got it from anybody in the employ of any of the offices or departments that I have mentioned.

A. I decline to answer on the ground that it might tend to incriminate me.

Q. Do you honestly and truly believe the answer to that question might tend to incriminate you?

A. I do.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. From what person or persons, source or sources, and in what manner, did you get the information upon which you based that part of the article which states that "Mrs. Alexander has made revelations to the United States Attorney", and which states, "After the case had been thrashed out by the Customs officials, Heitemeyer and Mrs. Alexander were taken before the United States Attorney to whom the case was turned over"? These are both questions from the record itself?

A. I decline to answer on the ground that it may tend to incriminate me.

Q. Do you honestly and truly believe that an answer to that question might tend to incriminate you?

A. I do.

10 Q. Do you so state notwith-standing all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Did you receive any of the information which you have incorporated in that article from any person or persons in the employ of the New York Tribune, and, if your answer is "Yes", did such person or persons tell you from what person or persons or source or sources, the information was obtained?

A. I decline to answer on the ground that it might tend to incriminate me.

Q. Do you honestly and truly believe that the answer to that question might tend to incriminate you?

A. I do.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Mr. Curtin, why don't you, if you are sincere in your statement and honestly believe that the answer to these questions will tend to incriminate you, accept this pardon from the President of the United States, which, in its language and terms, absolves you from any and all offenses that you may have committed against the United States in connection with the publication of that specific article?

A. I decline to answer on the ground that it might tend to incriminate me.

Q. Do you so state, notwithstanding all that has been told you in regard to this warrant of pardon and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Is it that you don't want to be absolved from anything that you fear might tend to incriminate you?

A. I decline to answer.

Q. On what ground?

A. Same way.

Q. Just express it.

A. On the ground that it would tend to incriminate me.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Suppose that you were actually on trial, Mr. Curtin, for having committed any offenses that would arise under section 37 and 39 of the Criminal Code of the United States, and you were offered this warrant of pardon, and you thought that it would absolve you from the consequences of the acts with which you are charged, you would take the pardon then, wouldn't you?

A. I decline to answer that, Mr. Carstarphen, with all due
11 respect to you, on the ground that it might tend to incriminate me.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the warrant, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Do you doubt the validity of this warrant of pardon in so far as the fact that it is issued by the President of the United States and the Attorney General is concerned—I mean, now, as a document, as a warrant of pardon?

A. I question its validity, I question its validity, but I recognize that the signature of the President—you say that the signature of the President is there; I don't know the President's signature.

Q. But your refusal is not based upon any technical grounds that it is not signed by the President of the United States, or that it is not signed by the Attorney General, is it?

A. Not at all.

Q. Well, then, it is a fact, isn't it, that the reason that you don't want to take the warrant of pardon is because you want to continue to refuse to disclose the source of your information in regard to that article?

A. I decline to answer that question.

Q. On what ground?

A. On the ground that it might tend to incriminate me.

Q. Do you so state notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. Now, isn't it a fact, Mr. Curtin, that the real reason you don't want to accept that warrant of pardon is not because you fear that to answer these questions would tend to incriminate you, but because, as a newspaper man, you have the ethics of the newspaper business, which you desire to respect, and that you would rather go to jail for contempt and be able to say that you have refused to tell the source from which you got any information, than you would to accept the pardon and know that you could not possibly be proceeded against for a crime, and yet answer the questions?

A. May I have that question repeated?

Q. (Question repeated.)

A. I decline to answer that question, Mr. Carstarphen, on the ground that it would tend to incriminate me.

Q. Do you so state, notwithstanding all that has been told you in regard to this warrant of pardon, and all that you have learned in regard to the pardon, and notwithstanding the fact that it is still in existence and has not been revoked?

A. I do.

Q. What are you going to do about taking this warrant or pardon away with you this afternoon, Mr. Curtin.

A. Why, I am not going to take it away with me, I am going to leave it there, the same as I did before. I won't touch it or
12 take the possession of it.

Q. You are going to leave it on the table?

A. Yes.

Q. I notify you that I am going to return that warrant of pardon to the office of the Clerk of the District Court of the United States for the Southern District of New York, and ask him to again place it in the files of the court with respect to the contempt proceding against you, and that it will continue to repose there and that at any time—today, tomorrow or forever—that you may wish to come and get it and avail yourself of it, that it is there, and that if any pro-

ceeding is instituted against you by the United States Attorney on account of any of these matters in connection with the publication of these articles that you can go and get that pardon and it completely absolves you from any offenses, free and unconditionally, and I want you to know that.

A. That is very kind of you, Mr. Carstarphen, and I appreciate it.

Q. Now, in the face of all that, you still want the Grand Jury—you, an intelligent man, working, as you have, for years, on a New York newspaper—to understand that you are declining to answer these questions because you fear that to answer them would tend to incriminate you?

A. I want them to believe it, and I am stating the truth that it would still tend to incriminate me.

Q. (A Juror:) How can it incriminate you when you have the pardon right here?

A. Well, that is my belief.

Q. Now, you may recall that when this matter was up for argument before one of the Judges before whom we had one of the presentments for contempt, that that Judge stated in the course of his opinion that the laws of the United States were founded largely upon the action of Grand Juries. You've been requested by the Grand Jury to answer certain questions, and I as their mouthpiece in this matter,—and you all agree, don't you, gentlemen that I should ask him all these questions?

The FOREMAN: Yes, sir.

Q. You have been requested to answer certain questions and you have declined to answer; do you still decline to answer, when you know that all these gentlemen of the Grand Jury, and the Foreman, request that you do so?

A. I still decline to answer.

Q. And, knowing that one of the most important functions of the Government, as it's constituted in relation to its judicial function is that performed by Grand Juries in investigating to ascertain whether or not crimes have been committed?

A. Yes, sir.

Q. And that you are called here as a witness simply to ascertain whether or not a crime has been committed, and asked as a witness to testify?

A. And presented with a pardon signed by the President.

Q. In that connection, so that there may be no misunderstanding, I will say to you now, as I told you before, that you are called
13 as a witness and it was only when you yourself said that if you answered the questions it would tend to incriminate you, that a pardon was obtained for you so that you would no longer have that fear that you raised the question as to whether you had or had not committed a crime or whether the answer would tend to incriminate you. Now, we take that as your own statement, and if your own belief is honest and true and you do believe that it would tend to incriminate you, why, then, we have to say to you that there is here a pardon that will relieve you from any consequences.

A. Yes.

Q. Now, I understand that you decline to answer any of the questions that have been asked you on the advice of your counsel and on the ground that your answers would tend to incriminate you. In concluding the examination today, I now wish to call your attention — some matters that I did not interrogate you about at the previous hearings before the Grand Jury and these one or two considerations I am going to urge on you and ask you to give them careful thought and see if, in view of them, you do not think it better to reconsider your determination not to answer these questions.

A. Do you want me to carry that away with me by memory or are you going to give me a copy?

Q. I am going to tell them to you right now. One of the considerations is this—you realize, don't you, that when confidential information about a possible prosecution is published in the newspapers, such publication is a great handicap to the prosecuting officials?

A. I assume it would be, yes, sir.

Q. You are aware, I suppose, that such a disclosure of confidential information lays open to suspicion the Grand Jury, the employes of the District Attorney's office and the employes of the Customs House?

A. Well, I assume it would.

Q. You realize, do you not, that, until the person who betrayed this Government secret that you wrote about in that article is discovered, a large number of probably innocent men will rest under the suspicion of possibly having violated their duty?

A. The Grand Jurors, you say?

Q. I say that you realize, do you not, that until the person who betrayed this Government secret to you is discovered, a large number of probably innocent men rest under the suspicion of having possibly violated their duty?

A. Why, I suppose so.

Q. You are aware, I suppose, that a person indicted for smuggling and who leaves the country, cannot be extradited?

A. I did not know that.

Q. You are aware, I suppose, that there are a couple of dozen indictments for various offenders against the Customs laws pending in this Court in cases where the various defendants have fled the jurisdiction and where they cannot be extradited?

A. In that connection, may I recall some of my previous testimony in which I stated that I did not know, in the publication of these articles, that we were interfering with the workings of the United States Attorney's office. I learned subsequently that an indictment had been found on the Heitemeyer-Alexander case at the time our story came out, and also in the Littauer case, and from a publication of both those articles I personally could not see subsequently where any interference of justice had been thwarted in any way, and, not knowing that at the time—if I knew it at the
14 time I would have stopped publishing the stuff. I have stepped out of the Public Press stuff to enable Customs officials and others to get Customs offenders and we did not do it with any deliberation to try to thwart the ends of justice, and both Heitemeyer and Mrs. Alexander paid $2,000 each; Mr. Littauer paid a thousand

dollars each, he and his brother and six months' sentence which they did not serve, suspended, and I cannot see that in the publication of both those articles, that justice has been thwarted.

Q. The point I am trying to get at is this—that while it may be true that in the two instances that you have mentioned the parties who were indicted and who afterwards pleaded guilty, did not flee the country; nevertheless, that there was nothing to prevent any of those parties becoming fugitives from justice as soon as they read in one newspaper, and the only newspaper that published the account in New York, or anywhere else, that there was pending against them proceedings in which action was about to be taken and, by virtue of reading those articles, were advised that these things were under way.

A. May I ask you this—was the Littauer case before you at the time that article appeared?

Q. Yes, the Littauer case; the principal witness in that case had appeared before the Grand Jury, I think it was two or three days before Christmas Day, and the Littauer publication was upon the 31st day of December. In the Heitemeyer case the Grand Jury investigation had just been concluded; an indictment had been voted, but which had not been actually prepared, was handed up; however, in each instance, this was such a premature publication that it did advise people against whom investigations were pending, and who had not yet been arrested and who had not yet been indicted.

A. I don't want to take up your good time, but I want to qualify myself. In the case of the filing of the indictment with the Littauers, would it have been a bad thing to publish the indictment previous to their indictment?

Q. If it had been filed as a sealed indictment, that would have been so; after an indictment is actually filed and opened, then it is public property.

A. Well, the day that the indictment was filed the Evening Sun printed the whole text of the sealed indictment, and there don't seem to be any efforts at these people.

Q. Well, that matter will be looked into.

A. I am just trying to get parallel on that thing myself.

Q. The thing I am trying to direct your attention to is this—that, after all, even when the indictment is sealed, the Grand Jury has ceased its connection with it.

A. I see.

Q. It has been handed up, it is then a returned indictment, they have voted on the subject; but when the matter is pending before the Grand Jury, when witnesses are yet to be examined, when investigations are yet pending, for the sake of illustration in the Littauer case, it was necessary to make an extended investigation to corroborate such a statement by an important, principal witness, and that until such investigations could be made and those statements corroborated, the investigation could not proceed further, and that it had been adjourned for the particular purpose of
15 conducting a secret investigation, undertaking to corroborate those statements that had been made and it was while this

was under way and between the adjourned sessions of the Grand Jury that this article was published in the Tribune.

A. Well, as you know, I didn't write the Littauer story.

Q. No, you have stated you did not write the Littauer story.

(Here ensued colloquy between Mr. Carstarphen and several Jurors).

The WITNESS: I think, for the benefit of the Jurors, we are willing to make affidavits that, when we first came before the Grand Jury, that the information that they procured did not come from the office of the United States Attorney or from the Department of Justice.

Q. You made that statement at the previous hearings?

A. We exonerated this office from any connection with the case.

Q. Don't you think Mr. Curtin, that in view of the different proceedings that you have been through in connection with this matter, two presentments for contempt, and the number of times you have had to appear before Grand Juries, and the fact that there is a Presidential pardon in this instance that you can avail yourself of at any time, to relieve you, that you've gone about as far as ethics of the newspaper business require you to go to protect the informant?

A. I am not protecting the informant. I am declining to answer the question because I believe I would be incriminated, regardless of the presence of the so-called warrant of pardon which you tell me comes from the President of the United States.

Mr. CARSTARPHEN: I ask that the Foreman of the Grand Jury direct Mr. Curtin to appear again before this Grand Jury at its next session, April 7th, 1914, at three o'clock P. M.

The FOREMAN: April 7th at three o'clock P. M.

The WITNESS: I so understand, sir.

Mr. CARSTARPHEN: Without further notice or subpœna.

The FOREMAN: Without further notice or subpœna. Thereupon Mr. Curtin retired from the Grand Jury room.

Mr. CARSTARPHEN: I will retire from the room and I ask that, in this matter of William L. Curtin, and his refusal to answer the questions propounded to him this afternoon, that he be presented for contempt and that this Grand Jury will vote a presentment and instruct me to prepare the necessary papers.

* * * * * * *

Mr. Carstarphen returned to the room and the Foreman of the Grand Jury reported that the Grand Jury had voted a presentment against Mr. William L. Curtin for contempt, and requested Mr. Carstarphen to prepare the necessary papers.

16 Following is a copy of Warrant of Pardon hereinbefore referred to, and marked Exhibit "A":

"Woodrow Wilson, President of the United States of America to all to whom these presents shall come, Greeting:

Whereas William L. Curtin, a reporter on the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York in a proceeding entitled "United States v. John Doe and Richard Roe," as to the source of his information from which he wrote an article that appeared in the issue of the New York Tribune of December nineteenth, 1913, on the ground that it would tend to incriminate him to answer the questions; and,

Whereas, the United States Attorney for the Southern District of New York desires to use the said William L. Curtin as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and,

Whereas, it is believed that the said William L. Curtain will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself:

Now, therefore, be it known, that I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said William L. Curtin a full and unconditional pardon for all offenses against the United States which he, the said William L. Curtin has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the afore-mentioned article, and in connection with any other article, matter or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

17 In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Wa-hington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth.

[SEAL.] (Sgd.) WOODROW WILSON.

By the President:

(Sgd.) J. C. McREYNOLDS,

Attorney General"

18 The FOREMAN: I shall.

The said Grand Jurors thereupon voted a presentment against William L. Curtin, for contempt, and requested the United States Attorney to prepare the necessary papers.

H. SNOWDEN MARSHALL,

United States Attorney for the Southern District of New York.

ALEX. T. KELLNER,

Foreman of the Grand Jury.

(Filed April 16, 1914.)

19 GRAND JURY EX. B.

G. J. Z., 3/30/14.

Marked for Iden. No. One. Feb. 18/14.—R. F. S.

New-York Tribune. Vol. LXXIII, No. 24,505. Fair and colder to-day. To-morrow, fair. Rising temperature. New-York, Friday, December 19, 1913. Price one cent in City of New York, Newark, Jersey City, and Hoboken. Elsewhere two cents.

Plan Fight for Millions Saved by Duty Dodging.

U. S. Officials May Test Gem Importation for Mrs. Alexander.

Only Ten Per Cent Paid on Lavalliere.

Ornament was Dismantled, Otherwise Tax Would be 60 Per Cent.

Plan said to be Legal.

If Procedure is Proved Irregular, Effort Will be Made to Collect in Old Cases.

Robert T. Heitmeyer, of Hoboken, the wealthy leather manufacturer, and Mrs. E. M. Alexander, who accompanied him to this country on the French liner France, arriving on November 22, have been charged before the federal grand jury with conspiracy in attempting to smuggle into this country a diamond and sapphire pendant valued at $500. The jewel has been seized and a strong effort will be made, it is said, to procure an indictment.

Mrs. Alexander, who was named by Mrs. Heitmeyer as corespondent in her action for divorce, has made revelations to the United States Attorney and the customs officials which involve previous purchases of jewelry abroad. It was brought out at the hearing that Tiffany & Co. had acted as an agent in the importation of a lavallière which the government believes should have yielded a duty of 60 per cent instead of 10 per cent paid by the jewelry firm.

Much Involved in Case.

The case, while similar to that of the Leeds pearl necklace, is entirely different technically, and the government, it is said, will make a test case of the lavallière imported for Heitmeyer by Tiffany & Co. in an effort to prevent the unsetting of gems abroad and the shipping of them to this country to evade the payment of duty.

If the courts decide that such procedure is unlawful it is estimated that millions of dollars will have to be returned to the government by jewelers who have availed themselves of this technicality of the law to bring in jewels under the 10 per cent class.

When Mrs. Alexander arrived here on the France on November 22 she walked ashore with the $500 pendant hanging at her neck. Her coat was unbuttoned at the throat, and several women travellers who talked with her on the pier admired the costly jewel.

"I must not let any one see this," she remarked to one of the women, and promptly buttoned her coat collar. Deputy Surveyor Bradley, in plain clothes, passed by at the time, heard her remark and saw her button her coat.

Shortly afterward, when he had donned his uniform, Bradley spoke to Mrs. Alexander and asked her many questions about the gem, which was not then in view. It was not included on her declaration, and she admitted that she had acquired it abroad. Further questioning brought the information that Heitmeyer had bought it for her at Tiffany's, in Paris, and had advised her not to declare it.

The gem was seized and taken to the Custom House, and on November 24 Heitmeyer and Mrs. Alexander were examined separately before the Surveyor. Admissions were made which proved to the satisfaction of the Surveyor and Solicitor Andrews that an effort had been made to smuggle. The couple were charged with conspiracy on the high seas to evade the payment of duty, not declaring the gem and trying to get it into the port without payment of duty.

Had Bought Other Gems.

After the case had been thrashed out by the customs officials Heitmeyer and Mrs. Alexander were taken before a United States Attorney, to whom the case was turned over.

Heitmeyer was asked if he had ever given Mrs. Alexander any other jewels while the couple were abroad and he said he had. He specified a lavallière, the foreign value of which was $1,800. This also was purchased a year ago at the Paris house of Tiffany & Co. He said he was willing to show the bill of sale if he could find it and suggested that perhaps Tiffany & Co. had a record of the transaction.

Asked if duty had been paid upon it, he said he did not know, but assumed it had, as the lavallière had been imported for him by Tiffany & Co. and delivered to him here.

Heitmeyer said he had the purchase charged to his account with the jewelry house in this city. He said he wanted the clasp changed, and this he understood was done in Paris.

Customs officials went to Tiffany & Co. and the entry was placed at their disposal. This showed that the lavallière consisted of two brilliants and twenty-one smaller diamonds. The piece had been dismantled abroad and the gems sent over unset with other stones. The duty of 10 per cent was paid, after which the entire piece was reassembled and set. Had the piece come over intact the duty would have been $1,080 instead of $180.

When this became known the United States Attorney and the Solicitor gave much consideration to this form of importation, and were inclined to the belief that while it might be legal and common practice an effort should be made to prevent importations in this fashion. Several men familiar with the customs law are of the

opinion that such method of importation is consistent with the law and should be allowed by the government. On the other hand, several legal representatives of the government are anxious that a test be made of this case.

If it is decided that such procedure is not regular it is said that an effort will be made to collect the additional 50 per cent in all cases where jewelry has been dismantled and brought in under the 10 per cent class. Under the new tariff a tax of 20 per cent is put upon all unset jewels.

Mrs. William B. Leeds, a widow of the "tinplate king," bought a pearl necklace, valued at $220,000, in Paris in 1906. She guaranteed to make payment on the delivery of the jewels to her in New port. Hugh Citroen, a Paris jeweller brought them unstrung to this country, declaring them on arrival and offering to pay a duty of 10 per cent. This was accepted. Later the government brought suit to collect $110,000 of the additional 50 per cent on the ground that the pearls had been unstrung for importation.

It was proved that the pearls had been strung temporarily for display purposes only and the Supreme Court, in February, 1912, decided in favor of Mrs. Leeds.

20 In the District Court of the United States for the Southern District of New York.

In the Matter of the Presentment of WILLIAM I. CURTIN as for an Alleged Contempt of Court.

Now Comes William L. Curtin and, for answer to the presentment returned herein by the Grand Jury for the Southern District of New York on the 16th day of April, 1914, alleges:

1. That on or about the 19th day of January, 1914, he appeared before the Grand Jury for the Southern District of New York in compliance with the terms of a paper, purporting to be a subpœna, theretofore served upon him, and was then and there sworn and examined, or attempted to be examined, as a witness and that thereafter and on or about the 26th and 30th days of January, 1914, and the 3rd, 10th and 18th days of February, 1914, he again appeared before said Grand Jury.

2. That thereafter and on or about the 19th day of February, 1914, the said Grand Jury filed its presentment with the Clerk of this Court wherein and whereby this respondent was presented as for an alleged contempt of court.

That a copy of said presentment so filed by said Grand Jury with the Clerk of this Court on February 19, 1914, is hereto annexed marked "Exhibit A" and is hereby made a part hereof as if herein fully set forth at length.

21 3. That thereafter and on the 20th day of February, 1914, this respondent duly filed with the Clerk of this Court his traverse to said presentment, a copy of which traverse so filed with the Clerk of said court is hereto annexed marked "Exhibit B" and is hereby made a part hereof as if herein fully set forth at length.

4. That thereafter and on the 21st day of February, 1914, the matter duly came on to be heard before the Hon. Learned Hand, Judge of the United States District Court for the Southern District of New York, upon a motion to punish this respondent as for a contempt of court upon the said presentment of the said Grand Jury and, thereafter and on or about the 27th day of February, 1914, the said Judge of the United States District Court duly filed with the Clerk of said court his opinion in said matter.

That annexed hereto marked "Exhibit C" is a copy of said opinion of said court and the same is hereby made a part hereof as if herein fully set forth.

5. That thereafter and on the 12th day of March, 1914, an order was made and entered herein adjudging this respondent to be in contempt of court. For more particularity as to the provisions in said order contained reference is hereby made to a copy thereof which is hereto annexed marked "Exhibit D" and the same is hereby made a part hereof as if herein fully set forth.

6. That thereafter and on or about the 30th day of March, 1914, this respondent appeared before the Grand Jury for the Southern District of New York in compliance with a paper purporting to be a subpœna theretofore served upon him and he was then and there sworn and examined or attempted to be examined as a witness and that thereafter and on the 7th day of April, 1914, he again
22 appeared before said Grand Jury.

7. That on March 30, 1914, he was interrogated before said Grand Jury by an Assistant United States Attorney and that to some interrogations propounded to him he made reply and to others thereof he declined to answer and that his reason for so declining to answer such interrogations was and is that he believed that his answers if given would tend to incriminate him.

8. That on the said 30th day of March, 1914, when he appeared before said Grand Jury, a gentleman, who, he is informed, is an Assistant United States Attorney for the Southern District of New York, handed to him a paper and at the time said paper was so handed to this respondent said Assistant United States Attorney stated in substance and effect that the President of the United States had granted to this respondent a full and unconditional pardon for all offenses against the United States which respondent had or might have committed or taken part in, in connection with the securing, writing about or assisting in the publication of the information in regard to an article which appeared in the "New York Tribune" in its issue of December 19, 1913, and in connection with any other article, matter or thing concerning which he might be interrogated in the Grand Jury proceedings entitled "United States vs. John Doe and Richard Roe" and at the same time respondent was requested to examine said paper purporting to be a pardon and satisfy himself that it was the same warrant of pardon referred to and set forth in the presentment of February 19, 1914, hereto annexed marked "Exhibit A."

9. That respondent did not accept said paper, has never
23 accepted the same and here and now refuses to accept the same and denies the power of anyone to compel him to accept it.

10. That the said paper purporting to be a warrant of pardon is not now and never has been in the possession of this respondent and respondent does not know whether the alleged copy of said paper set forth in the presentment of February 19, 1914, and in the presentment of April 16, 1914, is a correct and true copy thereof. It appears from the copy of said alleged paper purporting to be a warrant of pardon, set forth on pages 3 and 3*a* of the presentment of February 19, 1914, and on pages 13 and 14 of the presentment of April 16, 1914, that said alleged warrant of pardon is directed to one William I. Curtin and that it also appears on page 2 of said presentment of February 19, 1914, and on page 1*a* of the presentment of April 16, 1914, that this respondent testified before the Grand Jury that his name was William L. Curtin. This Respondent further alleges that said paper purporting to be a warrant of pardon is not directed to respondent and respondent is not named or mentioned therein.

11. Respondent denies the right of the President of the United States to grant to him a full and unconditional pardon or any other sort or kind of pardon for any alleged offense of which this respondent has not been convicted, and alleges that the attempt so to do is unwarranted in law and contrary to the provisions of the Constitution of the United States.

12. That the questions and answers set forth in the said presentment of February 19, 1914, "Exhibit A" hereto annexed, and that the questions and answers set forth in the presentment of April 16, 1914, are substantially correct and that in every case therein where it appears that respondent was asked a question and he de-
24 clined to answer the same, his so declining to answer was for the reason that he honestly believed that his answer to said question might tend to incriminate him.

13. That under the provisions of the Constitution of the United States respondent has the right, and had the right, to decline to answer any question propounded to him before said Grand Jury if he honestly believed the same would incriminate him, and the attempt on the part of the President of the United States to grant to respondent a pardon, which the said President had no power or authority to grant and which this respondent declined and declines to accept, did not and does not alter, limit or abridge respondent's rights and privileges in the premises.

14. Upon information and belief that the Grand Jury making this presentment is an illegal body sitting without authority in law and that it is not authorized to investigate into the commission of any alleged crime or to interrogate any witness and particularly this respondent.

15. Upon information and belief that said alleged Grand Jury, in the matter in which this respondent was being interrogated on the 30th day of March, 1914, was not and is not inquiring into the commission of any crime, but is inquiring about matters which do not constitute any crime against the United States and that it therefore had and has no power to interrogate this respondent and this Honorable Court is without power to compel this respondent to

answer any interrogations which may be or may have been propounded to him.

16. That by the terms of Article II Section 2 of the Constitution of the United States, the President of the United States only has power to grant reprieves and pardons for offenses against the United States; that this respondent has not been convicted of, indicted for the commission of, or admitted the commission of any crime or offense against the United States nor has it been proven that this respondent has been guilty of any crime or offense against the United States and that therefore the President of the United States is without power in the premises and had no power to grant to this respondent any pardon of any nature whatsoever.

17. That to compel this respondent to answer the questions propounded to him before the said alleged Grand Jury on March 30, 1914, by foisting upon him or attempting to foist upon him the aforesaid unwarranted and illegal paper characterized as a pardon will constitute an invasion of respondent's constitutional rights and result in his being deprived of a property right without due process of law, in violation of Article V of the Amendments to the Constitution.

Wherefore this respondent prays that the said presentment be quashed and that a judgment be entered herein adjudging your respondent not to be in contempt of this court and directing his discharge herein.

Dated, New York, April 20, 1914.

HENRY A. WISE,
Attorney for Respondent, William L. Curtin.
15 William Street, New York, N. Y.

STATE OF NEW YORK,
County of New York, ss:

William L. Curtin being duly sworn deposes and says that he is the respondent herein; that he has read the foregoing answer to the presentment returned against him herein and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WILLIAM L. CURTIN.

Sworn to before me this 20th day of April, 1914.

[SEAL.]

CARL E. WHITNEY,
Notary Public, New York County.

27 EXHIBIT A.

The District Court of the United States of America for the Southern District of New York.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City of New York, within and for the District aforesaid, on the first Tuesday of February, in the year of our Lord one thousand nine hundred and fourteen, and continued by adjournment to and including the 19th day of February, in the year of our Lord one thousand nine hundred and fourteen.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America, within and for the District aforesaid, on their oath make presentment to this Court, stating that on the 18th day of February, in the year of our Lord one thousand nine hundred and fourteen, in the course of an investigation that the Grand Jurors were then making into certain alleged violations of §37 and §39 of the Criminal Code of the United States, William I. Curtin appeared before the said Grand Jurors in compliance with a subpœna served upon him, directing him to testify and give evidence in regard to an alleged violation of § 37 and of § 39 of the Criminal Code of the United States; that the said William I. Curtin, after being duly sworn, testified as follows:

28 Q. What is your name?

A. William L. Curtin.

Q. Where do you reside?

A. 1642 East 18th Street, Brooklyn.

Q. Were you an employe of the New York Tribune on the 19th day of December, 1913, and, if so, in what capacity?

A. I have been a reporter for ten years.

Q. I now inform you, Mr. Curtin, that this Grand Jury is and has been investigating alleged violations under sections 37 and 39 of the Criminal Code of the United States, and the commission of a crime that would come under one or both of these sections. When you first appeared before this Grand Jury in the afternoon of January 19th, 1914, was it under a subpœna to appear as a witness in connection with an alleged violation of sections 37 and 39 of the Criminal Code of the United States?

A. I presume it was.

Q. And did you thereafter and upon the 26th day of January, 1914, the 30th day of January, 1914, the 3rd day of February, 1914, and the 10th day of February, 1914, appear before this Grand Jury, and are you here again today before this Grand Jury in response to that subpœna and to the direction of the foreman of the Grand Jury that you should appear upon the days designated?

A. I so understand, Mr. Carstarphen.

Q. Mr. Curtin, I now inform you that the President of the United States has granted you a full and unconditional pardon for all offenses against the United States which you have committed or may have committed, or taken part in, in connection with the securing, writing about, or asserting in the publication of the information incorporated in an article which appeared in the issue of the New York Tribune on December 19th, 1913, and in connection with any other article, matter or thing, concerning which you may — interrogated before this Federal Grand Jury in the proceeding entitled the United States vs. John Doe and Richard Roe. I now offer you this warrant of pardon and I request that you will read it aloud.

(Whereupon witness again starts to read warrant of pardon, which he holds in his hands, and reads it aloud to its conclusion.)

The warrant of pardon is in the following terms:

29 Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

Whereas William I. Curtin, a reporter on the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York in a proceeding entitled "United States v. John Doe and Richard Roe," as to the source of his information from which he wrote an article that appeared in the issue of the New York Tribune of December nineteenth, 1913, on the ground that it would tend to incriminate him to answer the questions; and,

Whereas, the United States Attorney for the Southern District of New York desired to use the said William I. Curtin as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employe of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and,

Whereas, it is believed that the said William I. Curtin will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

Now, Therefore, Be it Known, That I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said William I. Curtin a full and unconditional pardon for all offenses against the United States which he, the said William I. Curtin, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding,—thereby absolving him from the consequences of every such criminal act.

In Testimony Whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this fourteenth day of February in the year of our Lord one thousand Nine Hundred and Fourteen,

and of the Independence of the United States the One Hundred and Thirty-eighth.

[Seal Department of Justice.]

WOODROW WILSON.

By the President:

J. C. McREYNOLDS,
Attorney General.

30 Q. Were you a reporter on the New York Tribune during the month of December, 1913?

A. Yes, sir.

Q. I show you a copy of the New York Tribune dated December 19th, 1913, and direct your attention to an article headed, "Plan Fight for Millions Saved by Duty Dodging," the first words of the article being, "Robert T. Heitmeyer of Hoboken" and the article ending on the second page with the words, "In favor of Mrs. Leeds." I ask you to examine that copy of the paper.

A. This one here? Yes, I saw it.

Q. You have read that article?

A. Yes, sir.

Q. That is the paper that is marked for identification, Exhibit 1. Did you write the entire article to which I have referred with the exception of the head lines?

A. Yes, sir; I think I have so testified before.

Q. Was the article written by you on a typewriting machine in the office of the New York Tribune on the evening of December 18th, 1913?

A. I don't know the date; yes, it was written the day before.

Q. From what source or sources, person or persons, and in what manner did you obtain the information you incorporated in the article which you have testified was written by you?

A. I decline to answer that question; I do not know in view of that what answer I can give, but I decline to answer.

Q. Will you state any grounds on which you decline to answer?

A. I don't know what this means; does this release me that I am not connected with a crime?

Q. This, Mr. Curtin, means and is intended to absolve you from any offenses you have committed or may have committed, on account of any information that you may have gotten, upon which this article was based, no matter from whom you may have secured it, for the writing of the article, the assisting in the publication of it, for any crimes that may have been committed by you or any offense, under the laws of the United States, under sections 37 and 39, those being the only sections that are being investigated by this Grand Jury, and furthermore, it also absolves you from the consequences of any criminal act in connection with any other article, or any article, matter or thing, concerning which you may be interrogated in the Grand Jury proceedings now pending before this afternoon Grand Jury entitled "United States vs. John Doe and Richard Roe?"

A. Well, wasn't it assumed that I was involved in a crime when I appeared on that subpœna, involving these two articles?

Q. The Grand Jury did not assume that you were involved in a crime; you were subpœnaed as a witness to testify concerning those alleged violations; it was you yourself who assumed that you were involved in a crime by refusing to answer on the ground that it would tend to incriminate you. Now, if you did believe it would tend to incriminate you, I now inform you that you have been pre-
31 sented with a pardon which absolves you from any offenses which you would have committed against the United States on account of anything you did in connection with the publication of that article, and I am now asking you, in view of the fact that that pardon has been presented to you, read by you and explained to you, if you will tell this Grand Jury from what source or sources, person or persons, and in what matter you obtained the information you incorporated in this article which you have testified was written by you?

A. Have I the right to refuse the pardon?

Q. The pardon was there and you have taken it up; I consider when you took up the pardon you have accepted it. In all fairness to you, Mr. Curtin, Mr. Burdick has received a pardon similar in its general terms to the one you have received and has retired from the Grand Jury room to consult with Counsel before he shall answer certain questions propounded to him, and if you desire to do that, the Grand Jury will be very glad to have you do the same thing.

A. He has accepted it?

Q. He has accepted it and taken it out of the room.

A. Well, I don't want to accept that, and I would like to talk to counsel before I take it up.

Q. I consider that the issuance of that pardon to you by the President of the United States couched in the language that it is, constitutes a pardon; you are pardoned by the President of the United States, and if you want to consult with counsel before you answer this other question, why, you are of course entitled to do so; you may take the pardon out and go to him and consult with him. The pardon is complete; I say to you that I am informed that it is the President's signature and the signature of the Attorney General of the United States?

A. May I entrust that to your keeping?

Q. No, Mr. Curtin.

(A Juror):

Q. The fact of his taking it in his hand makes no difference; it is not within his province to decline to accept a pardon issued by the President of the United States.

(Mr. Carstarphen):

Q. No, but if the witness has any idea of that kind I may suggest that he may have the privilege of consulting counsel to look into it. The opinion of the United States Attorney's office is that you are completely absolved, that that office cannot undertake any proceedings against you for anything in connection with the publication of that article.

A. In other words, I am testifying under immunity.

Q. It is more than immunity; there might be some question about any immunity to a witness before the Grand Jury for the reason that the immunity might be granted by the Attorney General or the United States Attorney's office and they might go out of office, but you have now something that is more than the mere granting of immunity; you have now a full pardon from the President of the United States.

32 A. A pardon for a crime that has not been proven?

Q. You have testified that it would tend to incriminate you and then you put yourself before the Grand Jury as believing that you have committed some crime or an offense; now, without even the Grand Jury voting on the subject as to whether you have committed it, upon the strength of your own statement that to answer would tend to incriminate you, there has been obtained for you and delivered to you a full, complete and unconditional pardon for any offense or any crime you could possibly have committed in connection with the article, from whatever source you may have gotten it; it is just as complete as it could be made so that if you did believe and continued to believe that to answer those questions as to the source from which you got that information would incriminate you, that pardon clearly absolves you.

A. In payment for that, I am to surrender my source of information? I no longer can answer that it would tend to incriminate me, is that the idea?

Q. I will say to you very frankly if you do—you may if you wish—that I shall at once ask the Grand Jury to present you for contempt for failing to answer, and I shall then take the matter down under their presentment and present you before a Judge, and it is my belief, and I believe that the law will sustain me in it,—but I want you to have the benefit, if you care to, of consulting with counsel about it.

A. I see.

Q. Because I don't want you to rely simply upon what you are told here.

A. I will take your word for it that my taking that does not mean that I accept it.

Q. I say to you that in the opinion of this office it makes no difference whether you take it out of this room with you or not, but if you go out of the room, I want you to take the pardon with you because you can't consult with your counsel about it unless you have the pardon with you, and your counsel can't come into the Grand Jury room. I consider that the pardon is in effect from the moment that it was handed to Mr. Curtin.

A. Well, I took it in my hand and I did at request of you to read it; I didn't take it in any sense that I accepted it.

Q. The record will show exactly what you have had to say on it.

A. Yes, I read the pardon.

Q. If you take the pardon away with you and go out to consult counsel, this record will show exactly what you said about it and will show your statement that you don't want it to seem to be an acceptance on your part.

A. That is the idea, but technically, is it an acceptance?

Q. I have already explained to you that from the moment you were presented with the pardon and it was handed to you by me that it was effective.

A. And that my taking it out of the Grand Jury room does not effect the present status of that pardon? My having held it in my hand is just the same as if I took it out of the Grand Jury?

33 Q. In my opinion it is; in my opinion, from the moment you were handed the pardon and were acquainted with its contents it became absolute, if, in fact, it was not already absolute. If you take it out with you, Mr. Curtin, you have already made your statement here as to just how you feel about it, and your counsel, if he is outside waiting for you, as I understand he is——

A. (Interrupting.) I don't think he is.

Q. For your information, word has just come in to me that your counsel is outside, because Mr. Burdick, when he left the Grand Jury room with the pardon, stated that he would communicate to his counsel, and I presume his is your counsel also.

A. Mr. Carstarphen, would you instruct me to take it?

Q. I have already handed you and offered you the pardon, which I consider you then accepted.

The FOREMAN: And the Grand Jury considers you have accepted it.

The WITNESS: Well, that seems clear: I suppose I better take it. (Witness leaves the room with the pardon in his possession).

34 WILLIAM L. CURTAIN, recalled.

(The witness laid the pardon on the table).

(Mr. CARSTARPHEN:)

Q. Did you bring your pardon back with you, Mr. Curtin?

A. Yes, sir.

Q. You have read it over again?

A. No, sir.

Q. Did you show it to your counsel?

A. Yes, sir.

Q. Now, I again ask you from what source or sources, person or persons, and in what manner, did you obtain the information contained in the article which you testified was written by you?

A. I decline to answer on the ground that it might incriminate me.

Q. Do you honestly and truly and really believe that to answer that question might incriminate you?

A. Yes, sir, I do.

Q. Do you so state notwithstand- the fact that you have held in your hand and read and taken with you from this Grand Jury room the warrant of pardon issued by the President of the United States, and signed by the Attorney General of the United States and which absolves you from the consequences of any testimony you might give in this proceeding here before this Federal Grand Jury?

A. Yes, sir.

Q. From what person or persons or source or sources, and in what manner, did you obtain the information upon which you based that part of the article written by you with reference to Tiffany & Company and to supposed interviews between Tiffany & Company and the Customs officials?

A. I decline to answer on the ground that it may tend to incriminate me.

Q. Do you honestly, really and truly believe that the answer to that question might tend to incriminate you?

A. Yes, sir.

Q. Do you so state notwithstanding the fact that you have had in your hand and read and taken with you from the Grand Jury room the warrant of pardon issued by the President of the United States, absolving you from the consequences of any testimony you may give in this proceeding before this Grand Jury this afternoon?

A. Yes, sir.

Q. Did you get such information or any information in respect to this matter from any official or employe or person in any way connected with the office of the Collector of the Port of New York, the Surveyor of Customs at the Port of New York, from the Special Agent of the Treasury Department at the Port of New York, or the Appraiser's Stores at the Port of New York, or any person, employe, or anyone connected with the Treasury Department, or any employe of the United States Government whatsoever, or under the direction and control of the United States Government?

A. I decline to answer on the ground that it will tend to incriminate me.

Q. Do you honestly and really and truly believe that the answer to that question might tend to incriminate you?

35 A. I believe it would tend to incriminate me.

Q. And do you so state notwithstanding the fact that you have held in your hand and have read a warrant of pardon issued by the President of the United States completely absolving you from any consequences of any testimony you shall give in this proceeding now pending before the Federal Grand Jury?

A. Yes, sir.

Q. Did you get such or any information from any person not an employe of any of the different offices or departments that I have mentioned in the previous question, but who told you that he or she, or they, got it from anybody in the employ of any of the offices or departments that I have mentioned?

A. I decline to answer on the ground that it might tend to incriminate me.

Q. Do you honestly and really and truly believe that the answer to that question might tend to incriminate you?

A. I do.

Q. From what person or persons, source or sources, and in what manner did you get the information upon which you based that part of the article which states that Mrs. Alexander has made revelations to the United States attorney?"—and which stated "After the case had been thrashed out by the Customs' officials, Heitmeyer

and Mrs. Alexander were taken before a United States Attorney, to whom the case was turned over?" Those are quotations from the article?

A. I decline to answer, on the ground that it will tend to incriminate me.

Q. Do you honestly and really and truly believe that the answer to that question might tend to incriminate you?

A. Yes, sir.

Q. Do you so state notwithstanding the fact that you have held in your hand and read and taken with you from the Grand Jury room a warrant of pardon issued by the President of the United States, and signed by the Attorney General of the United States, absolving you from the consequences of any testimony you may give in this proceeding now pending before this Federal Grand Jury?

A. Yes, sir.

Q. Did you receive any of the information which you have incorporated in that article from any person or persons in the employe of the New York Tribune and, if your answer is "Yes," did such person or persons tell you from what person or persons or source or sources, the information was obtained?

A. I decline to answer on the ground that it may tend to incriminate me.

Q. Do you honestly and really and truly believe that the answer to that question might tend to incriminate you?

A. Yes, sir, I do.

Q. Do you so state notwithstanding the fact you have had in your hand and have read and have taken with you from the Grand Jury room a warrant of pardon issued by the President of the United States, absolving you from the consequences of any testimony you may give in this proceeding now pending before the Federal Grand Jury?

A. Yes, sir.

36 (The witness was directed to leave the room for a few minutes at this point).

WILLIAM L. CURTIN, recalled.

By Mr. CARSTARPHEN: Mr. Foreman, I ask that you will direct Mr. Curtin to report to the anteroom and remain there subject to further orders of the Foreman of the Grand Jury.

The FOREMAN: Mr. Curtin, you are so instructed by the Foreman of the Grand Jury to retire to the anteroom and there await the orders of this Grand Jury.

(Mr. CARSTARPHEN:)

Q. Before you retire, Mr. Curtin, I wish the foreman to advise you as to what will be the action of the Grand Jury, probably be the action of the Grand Jury, in view of your refusal to answer these questions which have been propounded this afternoon.

The FOREMAN: We will present you for contempt for not an-

swering the questions that have been propounded to you this afternoon. You so understand?

The WITNESS: Yes, sir.

(Mr. CARSTARPHEN:)

Q. Just take the document?

A. I don't care to take it.

Q. The document belongs to you.

A. I do not want to take it, Mr. Carstarphen; I don't want to be rude, but I don't care to take it.

Q. Why don't you want a pardon from the President of the United States that will absolve you from any offenses you may have committed against the United States and also from any questions you may answer this afternoon when you state the answers may tend to incriminate you?

A. I simply don't want the document; I don't care to testify; I say I decline to answer on the ground that it will tend to incriminate me and in view of that, I don't want to take the document.

Q. Is this refusal to take the document out of the room the result of advice you have taken?

A. I simply don't want it.

Q. Is it the result of advice?

A. I decline to answer.

Q. On what ground?

A. I simply decline to take the document; that is all I care to say.

Q. Isn't it a fact that your refusal to take this document out of the Grand Jury room with you is because you have had the consultation with counsel and as the result of that consultation you refuse to take it?

A. Well, I didn't want to take it before I knew Mr. Wise was in the hall and I don't want to take it now; I don't know whether he influenced me in any way or not.

The FOREMAN: As a matter of fact, he did influence
37 you.

(Mr. CARSTARPHEN:)

Q. Isn't it a result of the talk you have had with counsel that you don't take the document with you?

A. I don't think I have to answer that question; I simply refuse to take it; I personally don't want it.

Q. You don't want to be absolved from anything that you fear may incriminate you, is that the idea?

A. I don't want to take it, that is the idea.

Q. Well, if you thought that document would absolve you from the consequences of anything you have testified this afternoon or from any offenses that you may have committed against the Government of the United States or its laws, you would take it, wouldn't you?

A. I don't know.

(A JUROR:)

Q. Do you doubt the validity of this document?
A. Not for a minute.

(Mr. CARSTARPHEN:)

Q. What do you doubt?
A. I don't want to take the document.
Q. Isn't the reason that you don't want to take it because you want to continue to refuse to disclose the sources of your information as to what went into that article?
A. I don't care to answer that question on the ground that it will tend to incriminate me.
Q. You have just had in your hand and read a pardon wherein it has been stated that you will not be incriminated by anything which you may testify in this Grand Jury room, in this proceeding; do you still state that to answer any of the questions might tend to incriminate you?
A. I so recognize it; I don't regard it as worthless, and I don't care to accept it.
Q. Oh, I see, you regard the pardon as effective if you take it away from the room with you?
A. I put it on the table because I didn't want it.
Q. And because you feared that if you took it away with you that you would be accepting the pardon?
A. I simply don't want to accept that pardon.
Q. In the event that you should be prosecuted for the commission of any crimes or offenses under the laws of the United States which you have said your answers to questions would tend to incriminate you of, wouldn't you care to have that pardon?
A. I don't care to accept that document.
Q. Please answer that question?
A. Will you repeat it again?
(Question repeated.)
A. I can't answer that question, Mr. Carstarphen.
Q. Why?
A. I can't answer that.
The FOREMAN: We direct you to answer that; that is a straight question, Mr. Curtin; you are intelligent.
38 A. You or I am assuming something.

(Mr. CARSTARPHEN:)

Q. No, we have had evidence of it, Mr. Curtin; we are not assuming it.
A. I don't want to decline, but I don't know how to answer that question.
Q. Repeat the question. (Question repeated by the stenographer.)
A. I don't want the pardon, Mr. Carstarphen; I would like to answer your question but I don't know how to answer it.

(A JUROR:)

Q. Yes or no, Mr. Curtin, you would either like to have it or you would not like to have it.

A. I say I don't want the pardon; does not that convey the meaning?

(The FOREMAN:) Q. No.

(Mr. CARSTARPHEN:)

Q. In the event you should be prosecuted for any of the offenses or crimes which you say you fear that answers you might make might tend to incriminate you, or suppose you were actually on trial in the court would you refuse the pardon?

A. Yes, sir.

Q. Is that because simply that as a newspaper man regardful of what you consider the ethics of the newspaper business that you would rather go to jail than disclose sources of information given to you in your capacity as a newspaper man?

A. I decline to answer the question on the ground that it would tend to incriminate me.

(A JUROR:)

Q. Is there any understanding between you and Mr. Burdick and others in the Tribune office as to how you would answer questions put to you?

A. I decline to answer that it might tend to incriminate me.

(Mr. CARSTARPHEN:)

Q. What are you going to do about the document which has been handed to you by an assistant United States Attorney and which has come from the President of the United States and from the Attorney General of the United States?

A. I am going to leave it there on the table.

Q. Do you want the foreman of the Grand Jury to keep the custody of it for you, Mr. Curtin?

A. I have nothing to say on that question.

Q. Have you been advised that this is not a full and unconditional pardon?

A. No, sir.

Q. Has your counsel said to you that that document, which you read and which you took out and showed to him, did not grant upon the part of the President of the United States a pardon to you for the consequences of anything to which you might testify before this Grand Jury?

A. He said nothing to me about that.

(A JUROR:)

Q. Mr. Curtin, you were before one of the Judges in the Courts in the presence of this Grand Jury in this matter referring to this case and you were informed by that Judge that the laws of the United States were founded largely upon the action of Grand Jury-s, and you have been requested by the Grand Jury to answer

certain questions today which you have declined to answer;
39 do you still decline to answer those questions?

A. Yes, sir.

Q. In view of the fact that you have been informed by the Court that the—of the functions of the Grand Jury?

A. I understand—may I——

(Mr. CARSTARPHEN:)

Q. Yes, sir.

A. I understood the Judge to say that the three witnesses were to go back before the Grand Jury and they were to be the judges of what they could tell or what they could not tell and that they were to be the judges of it.

(Mr. CARSTARPHEN:)

Q. That, however, Mr. Curtin, was before a warrant of pardon had been issued to you. Now, do you still consider that notwithstanding the fact that you have been pardoned for any offense or crime that you could have committed or may have committed in connection with the publication of that article, that you still, in your judgment, should refuse to answer questions propounded to you before the Grand Jury?

A. I still decline to answer questions before the Grand Jury.

Q. But you no longer decline to answer questions because you think to answer would tend to incriminate you?

A. I do and have so answered.

Q. Mr. Curtin, as an intelligent man, reading the words that are written in that pardon, don't you realize that you cannot be incriminated by anything in connection with the publication of that article or by anything about which there may be questions before this Federal Grand Jury, in view of the fact that that pardon has been given to you? Frankly and honestly, don't you realize and know that?

A. I decline to answer.

Mr. CARSTARPHEN: I request, Mr. Foreman, that you will have Mr. Curtin wait in the anteroom of this Grand Jury room until the Jury wants him.

The said William L. Curtin being then directed to withdraw from the Grand Jury room, withdrew from the room.

(After the expiration of ten minutes during which another matter was considered by the Grand Jury, the witnesses, William L. Curtin and George Burdick were together brought into the Jury room and the following proceedings were had:)

Mr. WOOD: Mr. Foreman, will you please direct these two witnesses to appear tomorrow afternoon at four o'clock, at which time this matter of the presentment will be taken up?

The FOREMAN: You are so instructed, Mr. Curtin, and Mr. Burdick, to appear tomorrow at four o'clock before this Grand Jury.

Mr. CURTIN: All right, sir.

Whereupon Messrs. Curtin and Burdick left the room.

Mr. CARSTARPHEN: Will you please take the custody of the two

warrants of pardon that were left here this afternoon and retain them in your possession as foreman of the Grand Jury until
40 they can be attached to the formal presentment which will be made tomorrow afternoon at four o'clock?

The FOREMAN: I shall.

The said Grand Jurors thereupon voted that the said William L. Curtin was in contempt and directed that the entire matter be presented to this Honorable Court in order that such action might be taken in the premises as to this Court may seem just and proper.

H. SNOWDEN MARSHALL,
United States Attorney,
Southern District of New York.
BOYD DECKER,
Foreman of the Grand Jury.

41 EXHIBIT B.

In the District Court of the United States for the Southern District of New York.

In the Matter of the Presentment of WILLIAM L. CURTIN as for an Alleged Contempt of Court.

Now comes William L. Curtin and for answer to the presentment returned herein by the Grand Jury for the Southern District of New York, on the 19th day of February, 1914, and says:

1. That he admits that a paper purporting to be a subpœna was heretofore served upon him and that in compliance with the terms thereof he appeared before the Grand Jury for the Southern District of New York on or about the 19th day of January, 1914, and was then and there sworn and examined, or attempted to be examined as a witness, that thereafter and on or about the 26th and 30th days of January and the 3rd, 10th and 18th days of February he again appeared before said Grand Jury.

2. That on several of these days he was interrogated by an Assistant United States Attorney; and that to some interrogations so propounded to him he made reply and to others thereof he declined to answer; and that his reason for so declining to answer was that he believed that his answers, if given, would tend to incriminate him.

3. That on the 18th day of February he appeared before said Grand Jury and then and there a gentleman, who he is informed, is an Assistant United States Attorney, handed to him a
42 paper, and at the time the same was so handed to this respondent said Assistant United States Attorney stated that the President of the United States had granted respondent a full and unconditional pardon for all offenses against the United States which respondent had or might have committed, or taken part in, in connection with the securing, writing about or assisting in the publication of the information incorporated in an article which ap-

peared in the New York Tribune in its issue of December 31st, 1913, headed "Glove Maker's Gems May be Customs Size," and in connection with any other article, matter or thing, concerning which he might be interrogated in the Grand Jury proceedings entitled "United States vs. John Doe and Richard Roe;" and at the same time respondent was requested to read said paper, and respondent then and there did read the same.

4. That respondent did not accept said paper, has never accepted the same and now and here refuses to accept the same and denies the power of anyone to compel him to accept the same.

5. That the said paper is not now and never has been in the possession of this respondent and respondent does not know whether the alleged copy of said paper set forth in the presentment is a correct and true copy thereof. It appears from the copy of said alleged paper purporting to be a pardon, set forth on pages 3 and 3 A of the presentment herein, that said alleged pardon is directed to one William I. Curtin, and that it also appears on page 2 of said presentment that this respondent testified before the Grand Jury that his name was William L. Curtin. Your respondent therefore alleges that said paper purporting to be a pardon is not directed to your respondent and your respondent is not named or mentioned therein.

6. That respondent denies the right of the President of
43 the United States to grant to this respondent a full and unconditional pardon or any other sort or kind of pardon for any alleged offense of which this respondent has not been convicted; and alleges that the attempt so to do is unwarranted in law and contrary to the provisions of the Consitution of the United States.

7. That the questions and answers set forth in the presentment are substantially correct and that in every case therein where it appears that respondent was asked a question and he declined to answer the same, his so declining to answer was for the reason that he honestly believed that his answer to such question might tend to incriminate him.

8. That under the provisions of the Consitution of the United States respondent has the right and had the right to decline to answer any question propounded to him before said Grand Jury if he honestly believes the same will incriminate him, and the attempt on the part of the President of the United States to grant to respondent a pardon, which the said President had no power or authority to grant, and which this respondent declined and declines to accept did not and does not alter, limit or abridge respondent's rights and privileges in the premises.

9. That on information and belief, the Grand Jury making this presentment is an illegal body, sitting without authority of law and is not authorized to investigate into the commission of any alleged crime or to interrogate any witness and particularly this respondent.

10. That, on information and belief, said alleged Grand Jury in the matter in which this respondent was being interrogated, was

not and is not inquiring into the commission of any crime
44 but is inquiring about matters which do not constitute any crime against the United States, and therefore had and has no power to interrogate this respondent and this Honorable Court is without power to compel this respondent to answer any interrogations that may be or may have been propounded to this respondent.

11. That by the terms of Article II, Section 2 of the Constitution of the United States, the President only has power to grant reprieves and pardons for offenses against the United States; and this respondent has not been convicted of, indicted for the commission of, or admitted the commission of any crime or offense against the United States, nor has it been proven that this respondent has been guilty of any crime or offense against the United States, and therefore the President of the United States is without power and had no power to grant to this respondent any pardon of any nature whatsoever.

12. That to compel this respondent to answer the questions propounded to him before the said alleged Grand Jury, by foisting upon him or attempting to foist upon him the aforesaid unwarranted and illegal paper characterized as a pardon will constitute an invasion of respondent's constitutional rights and result in his being deprived of a property right without due process of law, in violation of Article V of the Amendments to the Constitution.

Wherefore this respondent prays that the said presentment be quashed and that a judgment be entered herein adjudging your respondent not to be in contempt of this Court and directing his discharge herein.

HENRY A. WISE,
Attorney for Respondent, William L. Curtin,
15 *William Street, New York, N. Y.*

45 STATE OF NEW YORK,
County of New York, ss:

William L. Curtin being duly sworn deposes and says that he is the respondent herein, that he has read the foregoing answer to the presentment returned against him herein and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WILLIAM L. CURTIN.

Sworn to before me this 20th day of February, 1914.

BYRD D. WISE,
Notary Public, New York County,

46 EXHIBIT C.

United States District Court, Southern District of New York.

UNITED STATES
against
GEORGE BURDICK and WILLIAM L. CURTIN.

This case comes up upon the presentment of a grand jury for contempt. The respondents, the city editor and a reporter of the New York Tribune, refused to answer questions regarding the sources of their information which was the basis of certain articles in that newspaper regarding customs frauds. They contended that disclosure would tend to incriminate them and they refused to answer. Later the president issued full pardons to both, covering any possible crime under these sections, which upon tender the respondents refused to accept and persisted thereafter in their refusal. Thereupon the grand jury presented them for contempt.

Frank E. Carstarphen for the United States.
Henry A. Wise for the respondents.

HAND, *D. J.:*

There is concededly only one question in the case, which is whether the unaccepted tender of a pardon will toll the privilege against incrimination. This in turn divides into two parts: May the President pardon for a crime of which the individual has not been convicted and which he does not admit? Is acceptance necessary to toll the privilege?

47 I have no doubt whatever that the President may pardon those who have never been convicted. The English precedents are especially pertinent. U. S. v. Wilson, 7 Peters 150, 160. Lord Coke, 3 Inst. 233, Chap. 105, Of Pardons, says expressly that the royal prerogative extended as well before as after "attainder, sentence or conviction." Two pardons of Edward I of indicted, but not yet convicted, men, are given in full on pages 234, 235. Blackstone, Vol. IV, Chap. XXVI, subdivision IV, 4, gives a pardon as a special plea in bar to an indictment, and rather strangely, in view of later practise, observes that they are good "as well after as before conviction." Later, in Chapter XXVIII, he notes the advantage to the defendant of pleading a pardon in arrest of judgment, in that it avoided the attainder of felony. Chapter XXX deals with reprieves and pardons and subdivision II, 1, shows clearly that pardons before conviction were valid except in impeachments, where they were, however, valid after conviction.

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. The instances are collected in an opinion of President Taft, while Solicitor General, Opinions of the Attorney-General, Vol. XX, pp. 339 et seq. They include

amnesties by President Washington in 1795, President Adams in 1800, and President Madison in 1815. President Lincoln's amnesty of 1863 may perhaps be thought to depend upon 12 St. at Large 592 and not to be a precedent, though Chief Justice Chase indicates a contrary notion in U. S. v. Klein, 13 Wall. 128, 141. President Johnson proclaimed a general unconditional amnesty to all who had taken part in the Civil War on December 25, 1868, and
48 this was held valid to forgive forfeitures, even as against a subsequent legislative repeal, U. S. v. Klein, supra, Armstrong v. U. S., 13 Wall. 154. President Harrison acted upon the opinion of his Solicitor General, already mentioned, and issued a conditional amnesty to Mormons in 1893, 27 St. at Large 1058.

In Ex parte Garland, 4 Wall. 333, the Supreme Court recognized the effect of a pardon granted by President Johnson to restore General Garland, who had never been convicted, to his status as attorney and counsellor of the Supreme Court, though perhaps the discussion was not strictly necessary to the disposition of the case. However, Justice Field's language on page 380 is explicit, and the opinion of the minority does not question the propriety of a pardon for offences without conviction. President Jefferson appears to have issued a pardon to a proposed witness in the trial of Aaron Burr, with a view, as here, to tolling the privilege, but, though the witness refused to accept it, I cannot learn that the question of privilege was raised upon the trial itself. The precedent shows, however, that this practice was used as early as 1807.

It is suggested that a pardon may not issue where the person pardoned has not at least admitted his crime. I need not consider this, because everyone agrees, I believe, that if accepted the acceptance is at least admission enough. It is an admission that the grantee thinks it useful to him, which can only be in case he is in possible jeopardy, and hardly leaves him in position thereafter to assert its invalidity for lack of admission. And so there arises the
49 second point in the respondents' position, which is that, as they refused the pardon, they may still maintain the privilege. It is not necessary to assert that the pardon has any effect till accepted, U. S. v. Wilson, 7 Peters 150, 161; Re de Puy, 3 Ben. 307; I will for this purpose accept the contrary. When, however, the question is of privilege the witness only needs protection, Brown v. Walker, 161 U. S. 591, and he is protected when the means of safety lies at hand. If he obstinately refuses to accept it, it would be preposterous to let him keep on suppressing the truth, on the theory that it might injure him. Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity.

There was a suggestion that the privilege might rest upon the jeopardy of some other crime than that pardoned, but unless the witness is to be the sole judge, there is no basis for that position. In this Circuit we have always insisted that the court must see some reasonable ground for the witness's supposed fear, and may inquire so far, Brown v. Walker, supra.

The respondents are adjudged to be in contempt and are each

fined $500; they may purge themselves by appearing on notice before the present or any subsequent grand jury and testifying fully as to the sources of their information. If they still persist at that time in refusing to answer a commitment may issue in addition until they comply.

February 27, 1914.

——— ———, *D. J.*

50 EXHIBIT D.

At a Stated Term of the United States District Court for the Southern District of New York, Held at the United States Court House and Post Office Building, Borough of Manhatton, City of New York, upon the 12th Day of March, 1914.

Present: Honorable Learned Hand, District Judge.

In the Matter of WILLIAM L. CURTIN, a Witness Held in Contempt of Court by the Grand Jurors of the United States for the Southern District of New York.

A motion having regularly come on to be heard on the 21st day of February, 1914, before this Court, to punish the respondent, William L. Curtin, for contempt, upon the presentment of the Grand Jury of the United States for the Southern District of New York, filed on February 19, 1914, for contempt, for refusing to answer questions regarding the sources of his information which was the basis of certain articles in the New York Tribune of December 19, 1913, and December 31, 1913, regarding customs frauds; and the said William L. Curtin having on February 20, 1914, filed a traverse to said presentment; and it appearing to the Court at the hearing of said motion that the copy of said warrant of pardon, as set forth in said presentment, is a correct and true copy of the original warrant of pardon filed with said presentment; and that said warrant of pardon is intended for and directed to said respondent, William L. Curtin; and that the Grand Jury making
51 said presentment is a legal body, sitting with authority of law, and duly authorized to investigate into the commission of any alleged crime and to interrogate witnesses; and that said Grand Jury was duly inquiring into the commission of a crime or crimes; and said motion having been argued and submitted; and the court having on the 27th day of February, 1914, handed down its written opinion wherein it adjudged the said respondent, William L. Curtin, to be in contempt and imposed a fine of $500 upon said respondent with leave to purge himself by appearing on notice before the present or any subsequent Grand Jury, and testifying fully as to the sources of his information, and in the event of his refusal or failure to answer a commitment issue in addition until he so comply.

Now, after hearing F. E. Carstarphen, Assistant U. S. Attorney, in favor of the motion, and Henry A. Wise, Esq., in opposition,

Now, on motion of H. Snowden Marshall, U. S. Attorney, it is

Ordered that the respondent, William L. Curtin, is in contempt, and that he pay a fine of $500. with leave to said respondent to purge himself by appearing on notice before the present or any subsequent grand jury, and testifying fully, as to the sources of his information which was the basis of said certain articles in the New York Tribune regarding customs frauds, and in the event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply.

LEARNED HAND,
U. S. District Judge.

Filed April 20, 1914.)

52 At a Stated Term of the United States District Court for the Southern District of New York Held at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, upon the 20th day of April, 1914.

Present: Honorable Learned Hand, District Judge.

In the Matter of WILLIAM L. CURTIN, a Witness Held in Contempt of Court by the Grand Jurors of the United States for the Southern District of New York.

Upon the presentment of the Grand Jury of the United States for the Southern District of New York, filed in this Court on February 19, 1914, and upon a traverse to said presentment filed in this Court February 20, 1914, and upon the order of this Court duly made and filed on the 12th day of March, 1914, and the recitals therein contained by which order the respondent, William L. Curtin, was adjudged to be in contempt and to pay a fine of $500 with leave to said respondent to purge himself by appearing on notice before the present or any subsequent Grand Jury and testifying fully as to the sources of his information which was the basis of certain articles in the New York "Tribune" regarding customs frauds, and in the event of his refusal or failure to so answer, a commitment might issue in addition until he should so comply; and upon reading the presentment of the Grand
53 Jury of the United States for the Southern District of New York, filed in this Court on the 16th day of April, 1914, and the traverse to said presentment filed on the 20th day of April, 1914, and upon all the papers in this proceeding, and it appearing to the Court that the said respondent, William L. Curtin, pursuant to the said order of this Court, filed on the 12th day of March, 1914, appeared upon notice before the Grand Jury of the United States for the Southern District of New York and refused and failed to purge himself of said contempt as provided in said order, and it appearing that the copy of said warrant of pardon as set forth in said presentment, filed on February 19, 1914, is a correct and true copy of the original warrant of pardon filed with said presentment, and that said warrant of pardon is intended for and directed to said respondent, William L. Curtin;

Now, upon motion of H. Snowden Marshall, United States Attorney, it is hereby ordered and adjudged that the said respondent, William L. Curtin, has failed and refused to purge himself of said contempt; and it is further ordered that the said respondent, William L. Curtin, pay a fine of $500, and that he be committed to the custody of the United States Marshal for the Southern District of New York until he shall purge himself of said contempt, or until the further order of this Court in the premises.

LEARNED HAND,
U. S. District Judge.

(Filed April 20, 1914.)

54 United States District Court, Southern District of New York.

In the Matter of an Alleged Contempt of Court of WILLIAM L. CURTIN.

Assignments of Error.

Now comes the above named William L. Curtin, plaintiff-in-error, by his attorney, Henry A. Wise, and files the following assignment of errors upon which he will rely upon the prosecution of the writ of error to the United States Supreme Court sued out by him herein to review the order made on the 20th day of April, 1914, ordering and adjudging him to be guilty of a contempt of court and committing him to custody, as follows:

1. That the court erred in ordering and adjudging the said William L. Curtin to be guilty of a contempt of court by its said order entered on said date.

2. That the court erred in not adjudging him to have been not guilty of a contempt of court.

3. That the court erred in making and granting said order adjudging him in contempt of court and committing him to custody.

4. That the court erred in refusing to make and grant an order ordering and adjudging that he was not in contempt of court and declining to commit him to custody.

5. That the court erred in adjudging that the alleged warrant of pardon herein had any force or effect whatsoever.

6. That the court erred in not adjudging that the alleged warrant of pardon herein was null, void and of no effect.

55 7. That the court erred in adjudging that the alleged warrant of pardon, unaccepted, operated to take away from him his constitutional right against self-incrimination.

8. That the court erred in not adjudging that he could not, by virtue of said alleged warrant of pardon, unaccepted, be compelled to give evidence which might tend to incriminate him.

9. The court erred in not adjudging that there is no power in the President of the United States to issue or grant a pardon where there is no evidence that the person to whom such pardon is attempted to be issued or granted has committed any offense against the United States.

10. That the court erred in not adjudging that the attempted issuance and granting of said alleged warrant of pardon was an unauthorized exercise of, or attempt to exercise, a power not vested in the President of the United States by the Constitution or any of the laws of the United States.

11. That the court erred in not adjudging that the said alleged warrant of pardon, not having been accepted, had no force or effect whatsoever and was null, void and of no validity.

12. That the court erred in holding that the said alleged Grand Jury was lawfully inquiring into any offense against the United States.

13. That the court erred in not holding that said alleged Grand Jury was not lawfully inquiring into any offense against the United States.

14. That the court erred in holding that said alleged Grand Jury was lawfully inquiring into any matter about which he could be examined as a witness before such body.

56 15. That the court erred in not holding that said alleged Grand Jury was not lawfully inquiring into any matter about which he could be examined as a witness before such body.

16. That the court erred in not holding that said alleged Grand Jury was not inquiring as to any offense by anybody against the United States and therefore had no right to examine him as a witness.

Wherefore, the said William L. Curtin, plaintiff-in-error, prays that the order and judgment made herein on the 20th day of April, 1914, ordering and adjuding him, the said William L. Curtin, to be in contempt of court, and committing him to custody, for the errors aforesaid, and for errors in the record and proceedings herein, may be reversed and altogether held for nothing and that the said plaintiff-in-error may be restored to all things which he has lost by reason of said order and judgment and that the said District Court of the United States for the Southern District of New York be directed to vacate and set aside said order and judgment and directed to enter an order and judgment ordering and adjudging that the said William L. Curtin is not in contempt of court, and for such other and further relief as to the court may seem proper.

Dated, New York, N. Y., April 20th, 1914.

HENRY A. WISE,
Attorney for William L. Curtin, Plaintiff-in-Error, 15 William Street, New York, N. Y.

(Filed April 21, 1914.)

57 United States District Court, Southern District of New York.

In the Matter of an Alleged Contempt of Court of WILLIAM L. CURTIN.

William L. Curtin, feeling aggrieved by the order of the court made on the 20th day of April, 1914, ordering and adjudging him to be in contempt of court, comes now by Henry A. Wise, his

attorney, and petitions said court for an order allowing said William L. Curtin to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which said defendant shall give and furnish on said writ of error and that upon the giving of such security all other proceedings in this court be suspended and staid until the determination of said writ of error of the Supreme Court of the United States. And your petitioner will ever pray.

Dated, New York, N. Y., April 20th, 1914.

HENRY A. WISE,
Attorney for William L. Curtin, 15 William Street, New York, N. Y.

Filed April 21, 1914.

58 By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States of America, Greeting:

You Are Hereby Cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States District Court for the Southern District of New York, wherein William L. Curtin is plaintiff-in-error and you are defendant-in-error, to show cause if any there be, why the order and judgment in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given Under My Hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 20th day of April, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty Eighth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Filed April 21, 1914.)

59 United States District Court, Southern District of New York.

WILLIAM L. CURTIN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

It is hereby stipulated and agreed that the record in the above entitled matter shall consist of the following papers now on file with the Clerk of this Court.

Presentment filed April 16, 1914, and copy of pardon and copies of articles appearing in the New York Tribune therein referred to.

Traverse to Presentment filed April 20, 1914.

Order of Commitment dated April 20, 1914.
Petition for Writ of Error, dated April 20, 1914.
Writ of error, and order *following* writ, dated April 20, 1914.
Citation dated April 20, 1914.
Assignments of Error dated April 20, 1914.
New York, April 29th, 1914.

HENRY A. WISE,
Attorney for Plaintiff-in-Error.
H. SNOWDEN MARSHALL,
U. S. Attorney, S. D. of N. Y.

60 United States District Court, Southern District of New York.

WILLIAM L. CURTIN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.
Dated May 4th, 1914.

HENRY A. WISE,
Attorney for Plaintiff-in-Error.
H. SNOWDEN MARSHALL,
Attorney for Defendant-in-Error.

61 UNITED STATES OF AMERICA,
Southern District of New York, ss:

WILLIAM L. CURTIN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the Above-entitled matter as agreed on by the parties.
In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 5th day of May in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 24,205. S. New York D. C. U. S. Term No. 472. William L. Curtin, plaintiff in error, vs. The United States. Filed May 9th, 1914. File No. 24,205.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE BURDICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 471.

WILLIAM L. CURTIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 472.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled causes for joint argument.

The respondents, the city editor and a reporter of the New York Tribune, a newspaper published in the city of New York, refused to answer certain questions propounded by an assistant district attorney before the grand jury for the Southern

District of New York regarding the sources of the information which was the basis of certain articles in that newspaper regarding alleged customs frauds. They contended that disclosure would subject them to the risk of prosecution under sections 37 and 39 of the Criminal Code for conspiracy to defraud the United States and for bribery of an official to betray information. Subsequently the President issued pardons to both respondents, covering any possible crime under these sections, which upon tender respondents refused to accept, and persisted thereafter in their refusal not only to accept the pardons but to answer at a subsequent examination before the said grand jury substantially the same questions as propounded at the first examination, and thereupon the grand jury presented them for contempt.

The question is whether the unaccepted tender of a pardon will toll the privilege against incrimination.

The district court decided the question in the affirmative, adjudged the respondents to be in contempt, and assessed a fine of $500 against each, with additional direction that upon their failure to purge themselves of their contempt by appearing to testify a commitment should issue. They are now at large on bail.

The decision of the question involved is one of importance not only to the President in the exercise of his pardoning power, but to the Department

of Justice in future investigations of alleged crimes against the United States, and is thus of general public interest.

Notice of this motion has been served upon opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1914.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 471.

GEORGE BURDICK,
Plaintiff-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

No. 472.

WILLIAM L. CURTIN,
Plaintiff-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

Brief on Behalf of Plaintiffs-in-Error.

HENRY A. WISE,
Attorney for Plaintiffs-in-Error.

APPEAL PRINTING COMPANY, New York.

INDEX.

LIST OF ALL CASES REFERRED TO, ALPHABETICALLY ARRANGED, WITH PAGES WHERE CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE BURDICK, Plaintiff-in-Error, *v.* THE UNITED STATES.	No. 471.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM L. CURTIN, Plaintiff-in-Error, *v.* THE UNITED STATES.	No. 472.

STATEMENT, BRIEF AND ARGUMENT FOR THE PLAINTIFFS-IN-ERROR.

The cardinal questions in each of these cases are the same and the facts so identical that a statement of the facts in one will suffice for both.

Statement.

Curtin is a reporter for the Tribune, a newspaper published in New York City (Record, p. 22). Pursuant to a subpœna he appeared and was sworn as a witness before the United States Grand Jury for the Southern District of New York (Record, p. 22). Certain questions being then and there propounded to him he declined to answer, claiming, upon his oath, that his answer to such questions might tend to criminate him (Record, p. 24). Thereupon he was remanded to appear before said jury at a later day (Record, p. 22). Subsequently he appeared before said Grand Jury again and was then and there handed a paper which purported to be a warrant of pardon issued by the President of the United States (Record, pp. 4, 23); he stated that he did not wish the pardon and declined to accept the same (Record, pp. 5, 25); after such tender and refusal the Assistant United States Attorney, who was apparently conducting some investigation before said Grand Jury, repeated the questions which had formerly been propounded to Curtin, and which he had declined to answer, and he again declined to answer the same, reasserting his privilege and claiming, upon his oath, that his answers thereto might tend to criminate him (Record, pp. 6, 14). Thereupon the Grand Jury filed into Court and presented him as for contempt (Record, p. 15); a formal presentment was handed up by said Grand Jury (Record, pp. 2, 18) to which an answer was filed by Curtin (Record, pp. 18, 40). Argument having been heard, by the Court, an order was entered wherein and whereby Curtin was adjudged to be in contempt of Court and for his continued refusal to answer said questions it was adjudged that he pay a fine of $500 and stand committed until the same

should be paid and until he should have answered said questions (Record, pp. 39, 41). Curtin thereupon sued out his writ of error which was allowed (Record, p. 1) and was released upon bail until this Court shall have passed upon his writ of error. The proffered warrant of pardon reads as follows:

"WOODROW WILSON

President of the United States of America, To all to whom these presents shall come, GREETING:

"Whereas William I. Curtin, a reporter on the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York in a proceeding entitled 'United States *v.* John Doe and Richard Roe' as to the source of his information from which he wrote an article that appeared in the issue of the New York Tribune of December nineteenth, 1913, on the ground that it would tend to incriminate him to answer the questions; and

"Whereas, the United States Attorney for the Southern District of New York desired to use the said William I. Curtin as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and

"Whereas, it is believed that the said William I. Curtin will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, Therefore, Be it Known, That I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said William I. Curtin a full and unconditional pardon for all offenses against the United States which he, the said William I.

Curtin, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding,—thereby absolving him from the consequences of every such criminal act.

"In Testimony Whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

"Done at the City of Washington this fourteenth day of February in the year of our Lord one thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth.

"WOODROW WILSON.

"(Seal Department of Justice.)

"By the President:

"J. C. McReynolds,

"Attorney General."

(Record, p. 23.)

Assignments of Error.

The Circuit Court erred:

(1) In adjudging plaintiff-in-error to be guilty of a contempt of Court.

(2) In not adjudging him to have been not guilty of contempt of Court.

(3) In ordering him committed as for contempt of Court.

(4) In refusing to make and grant an order adjudging that he was not in contempt of Court.

(5) In adjudging that the alleged warrant of pardon had any force or effect whatsoever.

(6) In not adjudging that the alleged warrant of pardon was nuil, void and of no effect.

(7) In adjudging that the alleged warrant of pardon unaccepted operated to take away from plaintiff-in-error his constitutional right against self crimination.

(8) In not adjudging that plaintiff-in-error having refused to accept said warrant of pardon could not be compelled to give evidence which might tend to criminate him.

(9) In not adjudging that the President of the United States has no power to issue or grant a pardon in the absence of evidence that the person to whom such pardon is attempted to be issued and granted has committed any offence against the United States.

(10) In not adjudging that the attemptel issuance and granting of the warrant of pardon was an unauthorized exercise or attempt to exercise a power not vested in the President of the United States.

(11) In not adjudging that the said warrant of pardon not having been accepted had no force or effect whatsoever.

Note: The assignments of error appear in full upon pages 41 and 42 of the transcript of record.

POINTS AND AUTHORITIES.

I.

The proceeding before the Grand Jury was a "criminal case" within the meaning of the Fifth Amendment to the Constitution.

Counselman *v.* Hitchcock (142 U. S., 547).

II.

Plaintiff-in-error was privileged to decline to answer the questions upon the ground that his answers thereto might tend to criminate him.

Fifth Amendment, U. S. Constitution.
Burr's Trial, 1 Burr's Trial, 244 (Coombs).
Counselman *v.* Hitchcock (142 U. S., 564).
Sanderson's Case (3 Cranch., 638).

III.

The refusal of a witness to answer questions upon the ground that his answers may tend to criminate him does not constitute either an admission or proof of his guilt of any offense.

American & English Encyclopedia of Law (Vol. 30, p. 1170, and cases cited).
Rose *v.* Blakemore [21 E. C. L. (Ryan & Moody, 382), 774].
Phelin *v.* Kinderline (20 Penn. St., 354).
State *v.* Bailey (54 Iowa, 414).

Dorendinger v. Tschechtelin [12 Daly (N. Y.), 34].
Greenleaf on Evidence (Vol. 1, Section 469d, 16th Edition).
Wigmore on Evidence, Section 2272.
Act of Congress of March 16, 1878 (20 Stat., 30).
Wilson *v.* United States (149 U. S., 60).
Fitzpatrick *v.* United States (178 U. S., 304, 315).
Boyle *v.* Smithman (146 Pa., 255).
Beach *v.* United States (46 Fed. Rep., 754).

IV.

The President was without power to issue any pardon to plaintiff-in-error; and consequently the warrant tendered is null, void and of no effect.

Article II, Section 2, U. S. Constitution.
Martin *v.* Hunter's Lessee (1 Wheat., 304).
Cooley's Constitutional Limitations, page 11.
Ex parte Wells (18 How., 307).
Ex parte Garland (4 Wallace, 333).
20 Opinions, Attorney General, 330.
Am. & Eng. Ency., Vol. 24, pp. 575-6.
2 Hawkins P. C. C., 37, Section 9, page 543.
In re Nevitt (117 Fed. Rep., 448).
11 Ops. Atty. Gen'l, 227.
Howard's Case [Sir T. Raymond, 13; 83 English Reports (Full Reprint), 7].
United States *v.* Klein (13 Wall., 128).
Armstrong's Foundry (6 Wall., 766).

Carlisle *v.* United States (16 Wall., 147).
Lapeyre *v.* United States (17 Wall., 191).
Osborn *v.* United States (91 U. S., 474).
Wallach *v.* Van Riswick (92 U. S., 202).
United States *v.* Padelford (9 Wall., 531).
Armstrong *v.* United States (13 Wall., 155).
Pargoud *v.* United States (13 Wall., 157).

V.

Plaintiff-in-error having refused to accept the tendered pardon, the same is of no effect.

Wilson *v.* United States (7 Peters, 150).
Commonwealth *v.* Lockwood (109 Mass., 323).
Cooley, Const. Law, 3rd Ed., p. 115.

VI.

The decision of the Court below is equivalent to the conviction of plaintiff-in-error of an offense against the United States without trial by jury, and consequently in violation of his rights under the Constitution of the United States.

Fifth and Sixth Amendments, U. S. Constitution.
24 Am. & Eng. Ency., 579.
11 Opinions Attorney General, 227.
Dominick *v.* Bowdoin (44 Ga., 357).
Manlove *v.* State (153 Ind., 80).
Commonwealth *v.* Lockwood (109 Mass., 323).
People *v.* Marsh (125 Mich., 410).
U. S. *v.* Armour, 142 Fed. Rep., 808.

VII.

The tendered pardon is not an equivalent of the constitutional privilege of plaintiffs-in-error.

Counselman *v.* Hitchcock (142 U. S., 564).

Brown *v.* Walker (161 U. S., 591).

Cooley's Constitutional Limitations, pp. 5, 365.

The Argument.

I.

The facts in the case at bar are so similar to those in the case of *Counselman* v. *Hitchcock* (142 U. S., 547), and it has been so often decided by this Court that an investigation before a grand jury is a "Criminal Case" within the meaning of the language of the Fifth Amendment, that it is now asserted as a fact, and not by way of argument, that plaintiff-in-error was a witness in a "Criminal Case."

II.

The foregoing proposition being accepted there can be no question of the right of plaintiff-in-error

to decline to answer any question put to him which he, upon his oath, says he believes may tend to criminate him.

> "It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."
>
> Counselman *v.* Hitchcock (142 U. S., at p. 564).
>
> "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If in such a case, he say upon his oath that his answer would criminate himself, the Court can demand no other testimony of the fact."
>
> 1 Burr's Trial, 244 (Coombs); Vol. 25, Federal Cases.

In Sanderson's case (3 Cranch, 638), the facts, excepting that there was no offer of a pardon, were quite similar to those in the case at bar. In that case the foreman of the grand jury came down, and stated that a Mr. Sanderson had refused to answer who was the author of a certain publication in "The Baltimore Republican" supposed to reflect upon the Court and jury, in the trial of the cases of The United States *v.* Watkins, although he said it was confessedly written in this district; and that he said he could not answer the question without implicating himself. The Court said, that it seemed to the Court that he might be implicated by answering the question, and he was the sole judge whether it would; and, if it would, he was not bound to answer the question

Cranch, C. J., following the reasoning of Chief Justice Marshall in the Burr case,

> "thought that it might form a link in the chain of circumstances, leading to a prosecution against himself, as the publisher of the paper * * *."

He was not compelled to answer.

In the case at bar plaintiff-in-error was under oath when he asserted his privilege.

III.

It being established that plaintiff-in-error was a witness in a "Criminal Case" and as such entitled to assert his privilege against answering questions which he believed might criminate him, it is now asserted that the claim of such privilege does not constitute any evidence of the commission of any crime by him, and cannot be construed as proof or admission of the commission by him, of any *"offence against the United States."*

The authorities on this proposition are substantially unanimous.

> "If a witness declines to answer a question on the ground that his answer might criminate him, or subject him to a penalty or a forfeiture, no inference whatever may be drawn from that circumstance, and from the allowance of the privilege, so as to affect either party or the witness himself.
>
> "The refusal of a witness to answer a criminating question cannot be shown as a circumstance against him in a subsequent trial for the offense inquired of."

American & English Enclopedia of Law (Vol. 30, p. 1170).

"If the witness declines answering no inference of the truth of the fact is permitted to be drawn from that circumstance."

Greenleaf on Evidence, 16th Ed. (Vol. 1, Section 469d), citing:
114 Cal., 216.
123 Ill., 333.
56 Ind., 182.
88 Iowa, 55.
65 Minn., 230.
72 Miss., 1008.
2 Mich, 340.
150 N. Y., 291.
20 Pa., 354.
18 R. I., 207.
149 U S., 60.

This proposition is elaborately discussed by Wigmore, and after reviewing the English and American authorities he concludes, that in the case of an *"ordinary witness the inference that the criminating fact exists is not to be made because of his claim of privileges"* (Wigmore on Evidence, 1904, Vol. 3, Section 2272, at p. 3147).

In *Rose* v. *Blakemore* (21 E. C. L. [Ryan & Moody, 382], 774), the witness had refused to answer, claiming his common law privilege against self crimination.

"Brougham, in addressing the jury for the defendant, put it to them that the witness really must have been concerned in the publication (in regard to which the witness had refused to answer) for that a denial of it, if he could deny it, would not injure him; on which Abbott, Ld. C. J., interposed, and said that no such inference ought to be drawn;

> that there was an end of the protection of the witness, if a demurrer to the question were to be taken as an admission of the fact inquired into."

In *Phelin* v. *Kinderline* (20 Pa. St., 354), the Court said:

> "The claim of privilege and its allowance are no part of the evidence submitted to the jury, and no inference whatever can be legitimately drawn by them, from the legal assumption by the witness of his constitutional right. *The allowance of the privilege would be a mockery of justice, if either party is to be injuriously affected by it.*"

In *State* v. *Bailey* (54 Iowa, 414), the rule was stated as follows:

> "A witness is privileged from answering when it reasonably appears that the answer will have a tendency to a criminal charge. *It would indeed be strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it.*" (*Note.*—The italics are ours.)

The last quoted case is one where defendant, who was on trial upon a criminal charge, had in another trial refused to answer questions regarding facts which were the basis of the indictment upon which he was being tried.

In Dorendinger *v.* Tschechtelin [12 Daly (N. Y.), 34], the Court, at page 39, says:

> "The right of a man to refuse to answer in such a case is, in the language of Phillips, a right of self defense; for if he has a right to defend himself against a criminal charge, he must also have a right not to expose him-

> self to such a charge (2 Phillips, Evidence, 417). * * * But when such a question is put, it is due to the witness that the Court should advise him of his privilege to answer it or not, as he thinks proper, that he may be fully informed of his rights, *and if he refuses to answer, in the exercise of his privilege, no inference of the truth of the fact inquired about is to be drawn from that circumstance.*"

In *Boyle* v. *Smithman* (146 Pa., 255, at p. 276), the Court very tersely states the rule in the following language:

> "The privilege of the defendant to decline to furnish evidence against himself, would be of very little value if the fact that he claimed its protection could be made the basis of an argument to establish his guilt. *To extend to a defendant the formal protection of his privilege, and then allow the fact that he had claimed it, to be used as affording a presumption against him, would be a sort of mockery of which the law is not guilty.*"

Nor can the assertion of the privilege by a witness be the basis of any inference or argument that the witness is shielding some other person (*Beach* v. *United States*, 46 Fed., Rep., 754).

It is an accepted principle of law, in the United States, that every man is presumed to be innocent until he shall have been proven guilty in a competent tribunal. This presumption assuredly remains with a man, even though when he is upon the witness stand he invokes his privilege against criminating himself. For in doing so he does not admit that he has committed a crime, nor does he admit that he has been guilty of *any "offence against the United States,"* even though the ques-

tion which he refuses to answer may possibly relate to some such offence.

IV.

We come, therefore, to the consideration of the attempted exercise of the pardoning power by the President.

Plaintiff-in-error was a witness in a "criminal case" before the grand jury; and upon being asked certain questions, he refused to answer and asserted his privilege against self crimination. Thereupon the President affixed his signature to a paper by which he apparently purposed to grant unto the plaintiff-in-error a pardon. And right here the inquiry arises, for what? The answer is found by reference to the so-called pardon, which says that plaintiff is pardoned "*for all offenses against the United States which he * * * has committed or may have committed or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding,* thereby absolving him from the consequences of every such criminal act." The plaintiff-in-error naturally and properly rejected and refused to accept any such paper. And his reasons for so doing were three-fold: first, because the President was without power to issue any such pardon; second, because even had power existed plaintiff-in-error could not be compelled to accept the same, and,

third, because this purported pardon does not afford plaintiff-in-error an equivalent for his constitutional privilege not to be a witness against himself.

For the consideration of these propositions we must have reference to the applicable provisions of the Constitution. By Article II, Section 2, of the Constitution, the President *"shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."* Under this provision the President can exercise no power except that expressly given or given by necessary implication [*Martin v. Hunter's Lessee* (1 Wheat., 304, 326)].

> "The Government of the United States is one of *enumerated powers;* the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national Government assumes to possess."
>
> *Cooley's Constitutional Limitations*, page 11.

The above quoted provision of the Constitution conferring power upon the President to grant pardons *"for offences against the United States"* means just what it says, no more, no less. *There must be an offence before he can grant a pardon.* He cannot by his *ipsi dixit* create an offence in order to grant a pardon. He cannot surmise, speculate or guess that some person may have committed or taken part in an offence against the United States and then issue a pardon to the person who he assumes may have committed this imaginary offence. What is the "offence" for which he issues this alleged pardon? Until the offence exists he is powerless to act. And if the person sought to be pardoned has not been convicted of, or admitted that he has committed any

offence against the United States, how can the President exercise the power? There seems to be but one possible answer to these questions. And as the plaintiff-in-error has not been convicted of any offence, and has not admitted that he has committed any offence, and the President in his warrant cannot even specify any offence which he "may have committed or taken part in" or that he has committed or taken part in, it is apparent that the President's act in signing this alleged warrant of pardon was and is a nullity and of no force or effect whatsoever.

Assuming that the witness had answered the questions which he refused to answer, it is confidently asserted that, while such answers might tend to criminate the witness of some offence which he need not disclose, they do not afford any proof of the commission of any "offence against the United States" for which the President can grant a pardon. The very language of the proffered pardon refutes the idea that the President had in mind the granting of a pardon for any offence against the United States. The motive for its issuance is found in the preamble of the alleged pardon which reads: *"Whereas the United States Attorney for the Southern District of New York desires to use the said William I. Curtin as a witness before the said grand jury in the said proceeding for the purpose of determining whether any employe of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity."*

The attempted exercise of the power under such circumstances is an usurpation of a power not granted to the President; it is no more and no less than attempted legislation, by him, of an immunity under the guise of an exercise of the par-

doning power. The action is lacking in every element of a pardon.

This Court in construing the meaning of the President's power to grant reprieves and pardons in the case of *Ex parte* Wells (18 How., 307-311), said:

> "It meant that power was to be used according to law; that is, as it had been used in England, and these states when they were colonies; not because it was a prerogative power but as incidents of the power to pardon particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this Court instructed Chief Justice Marshall to say, in the United States *v.* Wilson, 7 Pet., 162: 'As the power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.' We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had

been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

"We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this Court in Cathcart *v.* Robinson, 5 Pet., 264, 280; and in Flavell's case, 8 Watts & Sargent, 197; Attorney-General's brief.

"A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical (3 Inst., 233). And the king's coronation oath is, 'that he will cause justice to be executed in mercy.' It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend (Co. Litt., 274, 276; 2 Hawkins, Ch. 37, Sec. 45; 4 Black. Com. 401). And if the felon does not perform the con-

dition of the pardon, it will be altogether void; and he may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced. Cole's case, Moore, 466; Bac. Abr., Pardon E. In the case of Packer and others—Canadian prisoners—5 Meeson & Welsby, 32, Lord Abinger decided for the Court, if the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon—or if, having assented to it, his assent be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case he is equally unable to avail himself of the pardon.

"But to the power of pardoning there are limitations. The king cannot, by any previous license, make an offence dispunishable which is *malum in se*, *i. e.*, unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void (2 Hawk., C. 37, Sec. 28). So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the king, because it is for the benefit and safety of all his subjects (3 Inst., 238). Nor, after suit has been brought in a popular action, can the king discharge the informer's part of the penalty (3 Inst., 238); and if the action be given to the party grieved, the king cannot discharge the same (3 Inst., 237). Nor can the king pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the king, and not a forfeiture to the party grieved (Hawk., C. 37, Sec. 33; 5 Chit. Burn., 2).

"When the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English

crown, or by its representatives in the colonies" (*Ex parte* Wells, *supra*).

This being so it is apparent from the English decisions that the President in attempting to grant the pardon involved in the case at bar exceeded any authority ever exercised by the English crown.

> "In England the King's pardon must name the offence upon which it is intended to operate except in cases of general pardons and amnesties."
>
> Am. & Eng. Ency., Vol. 24, p. 575.
>
> "In England it appears to be the rule that the King cannot pardon an offence without specifically naming it, for a pardon by the King without reciting the offense upon which it is intended to operate will be held invalid by the Court, the theory being that the King was not informed of the particular offense of which the recipient of the pardon had been convicted."
>
> Am. & Eng. Ency., Vol. 24, pp. 575-6, citing Hawkins P. C., Chap. 37, Sec. 9, p. 543; 1 Chit. Cr. Law, 771; Anonymous, 6 Coke 13 (b); Howard's Case, T. Raym., 13.

In Howard's Case, Sir T. Raymond, 13 (English Reports, Vol. 83, p. 7), a pardon was held invalid because it did not describe the offense. In 2 Hawkins' Pleas of the Crown, Chapter 37, Section 8, pages 382-3, it is said:

> "It seems to be laid down as a general rule in many Books, that where-ever it may be reasonably intended that the King, when he granted such Pardon, was not fully apprised both of the Heinousness of the Crime, and also how far the Party stands convicted thereof upon the Record, the Pardon is void, as being gained by imposition upon the King. And

this is very agreeable to the Reason of the Law, which seems to have intrusted the King with the high Prerogative, upon a special Confidence that he will spare those only whose Case, could it have been foreseen, the Law itself may be presumed willing to have excepted out of its general Rules, which the Wit of Man cannot possibly make so perfect as to suit every particular Case. And upon this Ground it hath been holden, that if one be indicted by these Words, that he hath slain a Man for having sued him in the King's Court, and the King make him a Charter of all Manner of Felonies; this Charter shall not be allowed, because it shall be intended that the King was not acquainted with the Heinousness of the Crime, but deceived in his Grant."

And in Section 9, pages 383-4, it is said:

"for if a Felony cannot be well pardoned where it may be reasonably intended that the King when he granted the Pardon was not fully apprised of the State of the Case, much less doth it seem reasonable that it should be pardoned where it may be well intended that he was not apprised of it at all. And if a Felony whereof a Person be attainted cannot be well pardoned, even tho' it appear that the King was informed of all of the Circumstances of the Fact, unless it also appear that he was informed of the Attainder; much less doth it seem reasonable that a Felony should be well pardoned where it doth not appear that he knew any Thing of it: For by this Means, where the King in Truth intends only to pardon one Felony, which may be very proper for his Mercy, he may by Consequence pardon the greatest Number of the most heinous Crimes, the least of which, had he been apprised of it, he would not have pardoned. And for these Reasons, as I suppose, general Pardons are commonly made by Act of Parliament; and have been of late Years very rarely granted by the Crown, without a particular Description of the Offence in-

tended to be pardoned. As to the Precedents of such general Pardons in *Rastal's Entries*, it may be answered, That their Authority seems to be of less weight when compared with those many Precedents of Pardons in the Register, every one of which particularly describes the Offence which is pardoned, and even those which relate to Homicide by Lunaticks, or Infants, or in Self-Defence, etc. except only one which pardons Escapes, but expressly excepts all voluntary ones. And therefore where the Books speak of Pardons of all Felonies in general as good, perhaps it may be reasonable for the most part to intend that they either speak of a Pardon by Parliament, or that they suppose, that the particular Crime is mentioned in the Pardon though they do not express it."

A careful examination of the English reports prior to the adoption of our Constitution fails to disclose any case in which the King attempted to grant a pardon in the absence of any evidence that the person pardoned had been guilty of any offence.

All authorities are in accord on the proposition that a pardon is an act of grace, an exercise of clemency and mercy partaking of the attributes of Deity.

It can hardly be argued that the offer of a pardon for any unknown offence that a man may possibly have committed, and the enforced acceptance of the same, by the person to whom it is issued, in order to compel him to testify in violation of his constitutional privilege, because the United States Attorney desires to use him as a witness, is an act of mercy, or an exercise of clemency or that it has any attribute of Deity.

In every reported case, in which the President's power to grant pardons, has been involved, the existence of the offence pardoned was either proven or admitted.

In *Ex parte* Garland (4 Wallace, 333) the warrant of pardon recited the facts constituting the offense, and the person to whom the pardon was granted was required to accept the pardon in writing, thereby admitting his guilt. He availed himself of the pardon and sought thereby to avoid taking an oath to the effect that he had not so offended, at the same time admitting the offense by asserting that by taking such oath he would commit perjury.

In *United States* v. *Klein* (13 Wallace, 128), the proof was before the Court that Wilson had given aid and comfort to the Confederacy in violation of the Federal Statutes.

In *Armstrong's Foundry* (6 Wallace, 766) there was evidence of the commission of the offense and Armstrong pleaded the pardon and his acceptance thereof and compliance therewith. The commission of the offense was adjudicated.

In *Carlisle* v. *United States* (16 Wallace, 147), the Court actually found that the claimants had committed the offense.

In *Lapeyre* v. *United States* (17 Wallace, 191), the Court had before it the facts constituting the offence for which the pardon was granted.

In *Osborn* v. *United States* (91 U. S., 474), the property of the claimant had been forfeited, the offense had been adjudicated. The same situation existed in the case of *Wallach* v. *Van Riswick* (92 U. S., 202); so also in *United States v. Padelford* (9 Wallace, 531). In *Armstrong* v. *United States* (13 Wallace, 155), the Court of Claims had found that the person claiming the benefit of the pardon had committed an offense against the United States, and in *Pargoud* v. *United States, id.*, 157, Pargoud admitted "that he was guilty of participating in the rebellion against the United States."

The power of the President to grant pardons is

very elaborately dealt with in a learned opinion written by Solicitor General Taft (20 Opinions Attorney General, 330). Throughout this opinion the Attorney General recognizes the necessity for the existence of an offence and an offender before the power may be exercised. In delivering this opinion the question to be decided was the power of the President to grant a pardon to a group or class of "offenders," to wit, "to all persons residing in Utah Territory, who have been guilty of polygamy, unlawful cohabitation or adultery, as denounced by the Acts of March 22, 1882 (22 Stat., 30), and March 3, 1887 (24 Stat., 635)."

Thus the sole question involved in that opinion was as to the power of the President to grant a pardon to "offenders" "guilty" of specific acts denounced as "offences against the United States." And nothing more was decided by that opinion.

In all of the above cited cases there was abundant evidence of the commission of an offence against the United States and in each case the benefit of the pardon was being claimed.

Judge Sanborn tersely states the proposition in the following language: "A pardon is a grant, a deed. But a deed does not and cannot convey that which the grantor has never had." *In re Neritt* (117 Fed. Rep., 448, 460).

Attorney General Speed, in 11 Op. Atty. Gen., 227, at page 228 says:

> "there can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of a state of facts from which a judgment of guilt would follow."

And at page 229, he says:

> "As a pardon presupposes that an offence has been committed, and ever acts upon the past, the power to grant it never can be exer-

cised as an immunity or license for future misdoing."

From the foregoing it seems apparent that the President in the absence of any proof of any offence against the United States has no power to grant a pardon; and a review of all reported cases fails to disclose any authority for any such action.

V.

This brings us to the consideration of the next proposition, *i. e.*, that plaintiff-in-error having refused to accept the tendered pardon the same is null, void and of no effect. The authorities hereinbefore cited are all to the effect that "a pardon is a gracious act of mercy." Throughout these authorities it is referred to as a "grant."

In *Wilson* v. *United States* (7 Peters, 150), the grand jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards, he withdrew this plea, and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the Court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the President of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day the counsel for the prisoner appeared in Court, and, on his behalf, waived and declined any advantage of protection which might be supposed to arise from the pardon re-

ferred to; and thereupon the following points were made by the District Attorney:

1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the Court.

2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the Court.

Six indictments had been returned against Wilson and one Porter; (a) for obstructing the mail of the United States from Philadelphia to Kimberton; (b) for obstructing the mail from Philadelphia to Reading; (c) for the robbery of the Kimberton mail, and putting the life of the carrier in jeopardy; (d) for the robbery of the Reading mail, and putting the life of the carrier in danger; (e) for the robbery of the Kimberton mail; (f) for the robbery of the Reading mail.

The defendants were found guilty upon the indictment (d) charging them with the robbery of the Reading mail and putting the life of the carrier in jeopardy, and sentenced to be executed. Thereafter Wilson withdrew his pleas of not guilty and pleaded guilty to indictments a, b, d, e, and f.

After these pleas of guilty were entered, and before being arraigned for sentence thereon, and before the above mentioned questions were raised by the District Attorney, the President of the United States granted to Wilson a pardon for *"the crime for which he has been sentenced to suffer death, remitting the penalty aforesaid, with this express stipulation, that this pardon shall not extend to any judgment which may be had*

or obtained against him, in any other case or cases now pending before said Court for other offences wherewith he may stand charged."

After the prisoner was arraigned upon the indictments to which he had pleaded guilty he was asked by the Court whether he had anything to say why sentence should not be pronounced for the crime whereof he stood convicted in this particular case, and whether he wished in any manner to avail himself of the pardon referred to, and answered that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to.

The Judges being in doubt the questions raised by the District Attorney were certified to this Court.

It is interesting to note, that, in this Court no counsel appeared for the prisoner and the questions certified were argued at length for the United States by the then Attorney General, who was afterwards the Chief Justice of the United States, Honorable Roger B. Taney. He contended in that case, as we now contend, that, the pardon in question *"is not a statute pardon,"* and *"that the Court cannot give the prisoner the benefit of the pardon, unless he claims the benefit of it, and relies on it by plea or motion. The form in which he may ask it is not material to this inquiry;* BUT THE CLAIM MUST BE MADE IN SOME SHAPE BY HIM. *It is a grant to him; it is his property; and he may accept it or not as he pleases."*

In the cases at bar the plaintiffs-in-error insist upon the soundness of Attorney General Taney's insistent contention, *"that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the Court cannot notice it,* • • •

"The necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it." We now argue as did the learned Attorney General: *"Suppose a pardon granted on conditions, which the prisoner does not choose to accept? Suppose the condition is exile, and he thinks the sentence a lighter punishment? Suppose he thinks it his interest to undergo the punishment, in order to make his peace with the public for an offense committed in sudden temptation? A prisoner might be placed in circumstances, when he would feel it to be his interest to suffer imprisonment or pay a fine, as the evidence of his contrition. Might he not, under such circumstances, refuse to accept a general and unconditional pardon?"*

The foregoing arguments of the learned Attorney General indicate, that in the days when those men who framed the Constitution of the United States were still alive, the power to grant reprieves, and pardons, conferred upon the President by the Constitution, did not carry with it any power to compel acceptance of any reprieve or pardon granted thereunder. But we are not confined to the arguments of the learned Attorney General for our authority. For the propositions so clearly asserted by him were enunciated as the law of the land by the distinguished jurist whom Mr. Attorney General Taney succeeded as Chief Justice.

Chief Justice Marshall, in delivering the unanimous opinion of the Court in that case, said:

> *"The Constitution gives to the President, in general terms, 'The power to grant reprieves and pardons for offences against the United States.'*
>
> *"As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to*

whose judicial institutions ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look to their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.

> *"It is the private, though official act of the executive Magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court"* (pp. 160-161).
>
> *"A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a Court to force it on him"* (p. 161).

The arguments of Attorney General Taney and the decision of the Court in the *Wilson* case, *supra*, received the approval of this Court in *Ex parte Wells* (18 Howard, 307), at pages 310-311.

In Cooley's Constitutional Law, 3rd Ed., 1898, at page 115, it is said:

> "A pardon *may be given* to a person under conviction by name; and *this will take effect from its delivery*, unless otherwise provided therein."

Thus it is seen the pardon is treated as a "gift" to which "delivery" is essential.

In the exercise of the power, in practically all reported cases it appears to have been regarded, by the donor, grantor or giver of the pardons in question, that an acceptance was essential; this

is especially so in cases where the persons to whom the pardons were offered had not been convicted of an offence against the United States.

In *Ex parte Garland, supra*, the pardon was granted upon the express condition that a written acceptance be filed with the Secretary of State.

In *Ex parte Wells, supra*, there was a written acceptance of the pardon. In all of the above quoted cases arising under the Captured and Abandoned Property Act the material act of acceptance was pleaded and proven.

In *Commonwealth v. Lockwood* (109 Mass., 323), Gray, J., at page 339, says:

> *"It is within the election of the defendant whether he will avail himself of a pardon from the Executive * * * if he does not plead the pardon at the first opportunity, he waives all benefit of the pardon."*

VI.

By Article V of the Amendments to the Constitution it is provided that

> "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor be deprived of life, liberty, or property, without due process of law; * * *"

and by Article VI of the Amendments it is provided that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature of the cause of

> accusation; to be confronted by the witnesses against him; * * * and to have the assistance of counsel for his defence."

None of these privileges have been accorded to the plaintiffs-in-error; yet of necessity they have been found guilty of *"an offence against the United States;"* otherwise there could be no pardon. Our argument under Point IV has established the necessity for the existence of an offence and an offender before the pardon can issue. It may be argued that a pardon obliterates the offence. But such argument fails to meet the situation. It is true, according to the authorities, that the pardon does obliterate the offence; but that is where the offence exists; here we have the situation where, by the pardon the President attempts to create the offence which at the same time he seeks to pardon. It cannot be logically argued that the offence is born and expires in the same instant. For that being so there is no offence to pardon. There must be a period between the creation and the annihilation of the offence. During this period the plaintiff-in-error has been convicted of an "offence against the United States," without the benefit of any of the rights assured to him by the above quoted provisions of the Constitution. The only possible theory upon which the Court can hold that plaintiffs-in-error must testify is that the pardon has operated. It could only operate where there was an offence against the United States; and as hereinbefore argued there being no evidence of any such offence its existence must have been created by the instrument which also obliterates it. There is no escape from this conclusion which brings us to the above *reductio ad absurdam.*

In 11 Ops. Atty. Gen'l., 227, at page 228, it is said:

"There can be no pardon where there is no actual or imputed guilt; the acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow."

In *Dominick* v. *Bowdoin* (44 Ga., 357), at page 363, Lochrane, C. J., says:

"No power can compel him to go through a trial at all if he does not desire to plead not guilty, and the petition for pardon, or acceptance of it, is a confession of the imputed offence; the pardon granted is accepted upon the principle of confession."

In *Manlove* v. *State* (153 Ind., 80), Baker, J., at page 80, says:

"Appellant was convicted of seduction. * * * The Attorney General, by verified motion to dismiss, shows that appellant since taking this appeal has married complaining witness and accepted the Governor's pardon. * * * Appellant admits these facts but contends that he is entitled to a review of the proceedings because that part of the judgment which assesses a fine and costs against him remains in force. A party may not accept a benefit based on the legality of a judgment and thereafter be heard to complain that the judgment is erroneous. * * * The pardon did not relieve appellant of the judgment for costs. They are a debt for which he remains liable to officers and witnesses. But they were assessed as part of the judgment which was *based on a verdict of guilty.*

"He may not so attack the judgment because, by asking and accepting executive clemency, he said in effect that he was rightly convicted."

In *Commonwealth* v. *Lockwood* (109 Mass., 323), Gray, J., at page 339, says:

"* * * it is within the election of the defendant whether he will avail himself of a pardon from the Executive * * * if he does

> not plead the pardon at the first opportunity, he waives all benefit of the pardon; *if he does so plead it, he waives all other grounds of defense.*"

In *People* v. *Marsh* (125 Mich., 410), Moore, J., at page 415 says:

> "When Mr. Marsh petitioned the Governor for a pardon, and it was issued to him, and he brought it into this Court, he, in effect, said he was guilty of the offense charged, that the conviction of the Court below ought to stand, and that he waived the bill of exceptions filed by him in this Court."

Thus, by the decision of the Court below, plaintiffs-in-error must accept the proffered pardon, and thereby confess their guilt, and admit that they are rightly convicted of some undefined crime.

VII.

The learned Court below erred in holding that the offer or tender of the warrant of pardon tolled the privilege of the plaintiffs-in-error against being witnesses against themselves. Such holding confers upon the President a power not embraced within any power delegated to him by the Constitution. The effect of such decision is to say "That the President shall have power to grant immunity to witnesses." And if he may grant a general immunity to one witness, he may grant a general immunity to a group or class of witnesses (20 Op. Atty. Genl., 333). But the holding goes even farther; it not only asserts that the President has the power to grant immunities but that he also has the

power to compel a person, to whom he offers such immunity, to be a witness against himself. Can it be argued that the framers of the Constitution intended to grant any such powers to the President? Does not the exercise of such powers fall clearly within the functions of the legislative and as clearly outside of the functions of the executive or judicial branches of the Government? Isn't the issuance of an unwarranted pardon by the Executive and its enforced acceptance by judicial coercion an unwarranted assumption, by these two branches of the Government, of a power clearly legislative? Isn't it an assumption of legislative powers? If such is not the case what was the necessity for the Chief Executive of this nation recommending to Congress the enactment of the Immunity Statute which was under consideration in the case of Brown *v.* Walker (161 U. S., 591), and of recommending its amendment, subsequent to Judge Humphrey's decision in the so-called Beef Trust Case? (United States *v.* Armour *et al.*, 142 Fed., 808).

In Cooley's Constitutional Limitations, at page 5, it is said:

> "A constitution is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised."

And at page 5:

> "But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individ-

ual rights, and shield them against the assumption of arbitrary power."

The same author at page 365, says:

> "As the Government of the United States was to be one of enumerated powers, it was not deemed important by the framers of the Constitutioin that a bill of rights should be incorporated among its provisions. If, among the powers conferred, there was none which would authorize or empower the Government to deprive the citizen of any of those fundamental rights which it is the object and the duty of the Government to protect and defend, and to insure which is the sole purpose of bills of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the Government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of the constitutional authority."

And in speaking of the constitutional prohibitions against unreasonable searches and seizures, it is said:

> "If in English history we inquire into the original occasion for these constitutional provision, *we shall probably find it in the abuse of executive authority*, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offences either committed or designed" (p. 426).

The following language of this Court in *Counselman* v. *Hitchcock*, *supra*, at page 582, seems peculiarly appropriate in the case at bar.

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may

> be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.*"

This attempted grant of pardon does not afford plaintiffs-in-error the protection guaranteed them by the Constitution. Paraphrasing the language of this Court in *Counselman* v. *Hitchcock, supra,* at page 565, this alleged pardon "cannot detract from the privilege afforded by the Constitution." Under any possible circumstances the pardon is utterly invalid in that it is not "so broad as to have the same extent in scope and effect" as the constitutional privilege of the plaintiffs-in-error. (Same case, page 585.)

Under no possible construction can the pardon in question be said to protect the witnesses against prosecution, conviction and punishment for offences, which they may have committed against the State of New York or any other State. The learned Court below in its opinion seems to assume that this contention is disposed of by the decision of this Court in *Brown* v. *Walker* (161 U. S., 591); but such is not the case. In that case Brown had been called as a witness before the grand jury, and upon being asked certain questions he declined to answer, asserting his

constitutional privilege against self crimination. The questions propounded to him related to certain payments in the nature of refunds or commissions upon certain shipments of freight. But at the time of so refusing the Act of Congress of February 11th, 1893, C. 83, 27 Stat., 443, was in effect; and that statute provided that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding." In view of this immunity statute this Court held that the protection to the witness was as broad as his constitutional privilege and he was accordingly directed to answer the questions propounded to him. This decision was upon the theory that by the *Sixth Article of the Constitution* the immunity statute in question was "the supreme law of the land" and that the immunity thereby granted extended "to any transaction, matter or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general and to be applicable whenever and in whatever Court such prosecution may be had" (p. 608).

Even admitting that the President may force his pardon upon a witness it is still apparent that

such pardon carries with it no such broad scope and effect as an act of Congress. For the immunity incident to the pardon can be no broader than the pardon. The President may only grant pardons for "offences against the United States." His pardon is not the paramount law of the sovereign states and is not "applicable whenever and in whatever Court such prosecution may be had," but only in such Courts as the pardoned person may be prosecuted for offences against the United States.

The assertion that the witness' disclosure may tend to criminate him of an offence against some one or more of the States is not the setting up of an imaginary danger. It is the setting up of a reasonable and probable consequence against which he receives no protection from the proffered pardon. It is a matter of common knowledge, of which this Court may take judicial notice, that from the same state of facts a man may be criminally liable for offending against the laws of the Federal and State Governments. Violations of the Federal Pure Food Laws, of the Federal Rate Regulation Laws, of the Federal Anti-Trust Laws, and other Federal statutes too numerous to mention, carry with them in nearly every instance a liability to punishment for violation of some similar State statute in the jurisdiction where the offence is committed. In the language of this Court in *Counselman* v. *Hitchcock*, *supra*, at page 564, the pardon offered to plaintiff-in-error, "could not, and would not, prevent the use of his testimony to search out other testimony to be used against him or his property, in a criminal proceeding in such Court. It could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he

might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." This being so and the pardon having no effect in the State Courts it seems clear that the witness has no adequate protection that can be said to be an equivalent of his constitutional privileges.

In the case at bar the newspaper articles in question are, upon their face libelous, and in the State of New York the publication of a libelous article is a crime (New York Criminal Code and Penal Law, Section 1340). The expressed purpose of the pardons in question is to compel these plaintiffs-in-error to testify as to their connection "with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article" (Record, p. 15). And to compel them to so testify subjects them to the possibility of a criminal prosecution in a jurisdiction where the proffered pardon is of no validity and affords no protection whatsoever.

Here then, is a concrete illustration of the difference between the immunity statute involved in the case of *Brown* v. *Walker*, and the pardon in the case at bar. There is another and even more convincing difference, if possible, and that is, that in *Brown* v. *Walker*, the Court held that the immunity statute afforded an absolute protection against conviction. That is, that, if the witness testifies he shall never be convicted "for or on account of any transaction, matter or thing, concerning which he may testify," while in the case at bar the very thing is done from which he would be protected by the immunity statute, and that is, that he is, by the President's *ipsi dixit*,

convicted first in order that he later may be compelled to be a witness.

It is respectfully submitted that the decision of the Court below should be reversed.

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NEW YORK PENAL LAW.

(§1340. LIBEL DEFINED.)

A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 471.

GEORGE BURDICK,
Plaintiff-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

No. 472.

WILLIAM L. CURTIN,
Plaintiff-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

HENRY A. WISE,
Attorney for Plaintiff-in-Error.

HENRY W. SACKETT,
Of Counsel.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

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IN THE

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

POINTS AND AUTHORITIES.

I.

The interpretation of the language of the Constitution conferring the pardoning power upon the

President, "and he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment", (Article II, section 2, subdivision 1) contended for by the United States stretches the actual language of the Constitution in that it makes the word "offences" connote conjectural or purely hypothetical offences in addition to ascertained events. Assuming for the sake of argument that this construction is permissible, upon a mere examination of the language, then there is presented a case in which there is a choice between two permissible constructions and in such a case the court must choose the one which is most in harmony with the Constitution taken as a whole and with the spirit of our institutions.

Gibbons v. *Ogden*, 9 Wheat., 1, 188.

Legal Tender Cases, 12 Wall., 457, 531–532.

In re Griffin, 17 Am. L. R., 358.

II.

The construction of the words conferring the pardoning power that is contended for by the United States would tend to destroy some of the most essential safeguards of free government. It would pervert the grand jury, which in its origin was an institution which stood as a barrier against persecution by the Crown into an instrument of inquisition that might be used by the Executive Department for the purpose of throttling the free and wholesome criticism of the acts of public officials. It would tend to destroy to a dangerous degree the separation

of powers between the executive and the judicial branches of the government and in practical effect would arm the executive with summary powers which ought to be possessed only by the judicial branch. It would inevitably create the possibility of putting into effect a system of censorship of news concerning the acts of public officials and tend to the creation of a secret and powerful bureaucracy.

Ex parte Bain, 121 U.S., 1, 10–11.

Kilbourn v. *Thompson*, 103 U. S., 168, 190.

United States Constitution, Article III, Section 1; Article II, Section 1; Article I, Section 1; Fifth Amendment.

THE ARGUMENT.

I.

The plaintiff in error does not admit that the language of the clause granting the pardoning power is fairly open to the construction sought to be placed upon it by the Government. The language of the instrument is, of course, the first source of light to which the Court must look. The word " offences " considered by itself and in connection with the other words in the clause must

according to ordinary and common usage denote things that are accomplished and known. It is a word of definite significance which in the absence of some explanatory phrase would naturally be read and understood as referring to definite and ascertained events. All the more is this true if we think of the clause in question as having been drafted by men trained in the use of legal terminology and anxiously endeavoring in this fundamental instrument to avoid looseness of expression. Therefore the clause cannot with propriety be construed as if it read "and he shall have power to grant reprieves and pardons for offences or alleged offences". It is true that it has been held that a pardon may be granted at any stage of a criminal trial and either before or after conviction, but it has not been held that an accused person who is on trial may be deprived of the opportunity of being acquitted by verdict of the jury by having a pardon thrust upon him whether he will take it or not. In the present case there is not even an alleged offence. There is only the hypothetical possibility that there may have been an offence. Still less should the clause be construed as though it read "for offences, actual or conjectural, against the United States". The word "offences" as it occurs in this phrase must, on a mere verbal analysis of the

clause according to the ordinary habit of expression which prevails among intelligent men, be construed as intended to denote something definite and demonstrated and not as intended to connote something purely speculative and hypothetical.

When we turn from the language of the instrument to the purpose of the grant this conclusion is fortified. The purpose of the grant as already shown was that there might exist somewhere within the machinery of the government a power to temper justice with mercy. The extension of the meaning of the word "offences" so as to include purely hypothetical offences obviously has no connection with the exercise of the divine quality of mercy.

It would appear therefore that whether we depend upon an examination of the mere language of the clause or upon a reference to the purpose for which it was inserted in the constitution the result is conclusive against the validity of the proffered warrant that is in question.

> "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it is given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. * * * We know of no rule for construing the extent of such powers, other than is given by the lan-

> guage of the instrument which confers them, taken in connection with the purposes for which they were conferred". (Marshall, *C. J.*, in *Gibbons* v. *Ogden*, 9 Wheat., 1, 188).

Let there be assumed, however, for the purpose of argument, that which the plaintiff in error does not admit, but on the contrary most emphatically denies, namely, that there is a fair choice open to the Court here between two permissible constructions of the word "offences", one of which would confine it to demonstrated acts and the other of which would extend it to conjectural events. If there is such a choice then the plaintiff in error invokes the aid of the familiar canon of construction that that interpretation must be chosen which is most in harmony with the general tenor of the Constitution and the spirit of our democratic institutions, and what we have to say under the next point becomes pertinent and material.

In the language of Chief Justice Chase, while sitting in the United States Circuit Court, in the District of Virginia :

> "A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the

instrument absolutely require such preference." (*In re Griffin*, 2 Am. Law Times Rep., 93, s. c., 17 Am. L. R., 358, U. S. Circuit Court, District of Virginia, 1869.)

II.

This leads us to an aspect of the question the importance of which we humbly urge requires the most serious consideration by the Court. We believe that a decision of this case supporting the learned Court below is big with the possibilities of mischief and oppression. This may not be apparent to the Court upon its first examination of the record and we therefore invoke the Court's most careful attention to the condition of law and fact that would exist in the event that the attempted exercise of the pardoning power in this case were held valid.

The instrument purporting to be a pardon signed by the President very frankly states the purpose for which the pardon was proffered.

> "WHEREAS William I. Curtin, a reporter on the New York Tribune, has declined to testify * * * as to the source of his information from which he wrote an article that appeared in the issue of the New York Tribune of December Nineteenth, 1913, * * *
>
> WHEREAS, The United States attorney * * * desires to use the said

> William I. Curtin as a witness * * * *for the purpose of determining whether any employee of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity.*" (Record, p. 15. Italics ours.)

It is not a crime for an employee of the Treasury Department to give out information concerning official acts or matters. It is a violation of a regulation of the Department, but it is not a crime under any statute of the United States. Further, it is not a crime to receive innocently from an official or employee of the United States information concerning official acts or matters pending in any department of the government, and it is not a crime to publish such information innocently obtained.

Nevertheless, under sections 37 and 39 of the Criminal Code of the United States, the publication of any information whatever about any official acts or matters pending in any of the departments of the government would in every case without any conceivable exception be a matter which the grand jury might be called upon to investigate by the United States Attorney in any department in which such publication took place because of the possiblity that such information might have been obtained as the result of a violation either of section 37 or of section

39 of the Criminal Code of the United States. Therefore in every case where information is published concerning the administration of the executive departments of our government, unless the information were furnished by the responsible head of the department, an investigation might be undertaken by the grand jury at the instigation of the United States Attorney as to where and how the information was obtained. An objection to the jurisdiction of the grand jury would be as unavailing in every such case as it is in the present case. The court would be powerless to inquire whether the grand jury was in fact acting in good faith in the investigation of a crime or was being used as an instrument of inquisition at the instance of a member of the President's cabinet for the purpose of ascertaining from what source uncomfortable news was gathered so that the person furnishing the news might be summarily punished not by criminal proceedings but by dismissal from office.

Every department of the Government by simply adopting a departmental regulation similar to the following, which was cited by the United States Attorney in the argument before the Court below, would then be supplied with a most potent, indeed terrorizing, instrument for preventing any of the acts or omissions of its officials from being made known to the public and subjected to whole-

some criticism, except such acts as the head of the department might voluntarily choose to reveal.

> "CUSTOMS REGULATIONS, 1908, page 565, Article 1407; PUBLISHING OR DISCUSSING OFFICIAL MATTER.—Making public official matter, or discussing it with persons having no official jurisdiction over it nor any official connection with the Department, without authority of the Secretary of the Treasury, is absolutely prohibited."

With such a regulation in force in each of the departments of the Government and with the decision of this Court upholding the pardoning power in such a case as that which is now before it, there would exist no legal impediment to the gradual establishment of a most drastic system of censoring the publication of news concerning official acts. Newspaper proprietors, editors and reporters could be hailed before the grand jury and indefinitely incarcerated for refusing to reveal the source of news that was embarassing or unwelcome to the official involved. There could be no escape for them. There would always exist the possibility that such information might have been obtained by bribery or through a conspiracy to defraud the Government and the questions asked would always be pertinent upon an inquiry by the grand jury into whether or not such a crime had been committed. By this means

the grand jury would in effect be annexed to the executive department of the Government and transformed into a body having power to inquire into mere infractions of departmental discipline, and the mere possession of such a power that could be exercised without impediment would tend most strongly to prevent publication of information about the acts of public servants which the public ought to have.

The grand jury in ancient times served as a barrier to protect the individual from royal oppression.

Ex parte Bain, 121 U. S. 1, 11.

But a state of law such as would result from upholding the decision of the Court below in this case would place the grand jury at the disposal of the President of the United States and of the officers of his cabinet. Instead of serving as a barrier against executive oppression it would become, with its almost unlimited inquisitional powers, an instrument for suppressing public discussion. Not only would the functions of the grand jury be thus perverted but the executive would also in practical effect be armed with one of the most summary powers that can be exercised by the judicial branch—the power to punish for contempt. When such a case as we have been supposing arose and the editor or reporter refused to state from whence his infor-

mation was derived, he would be presented by the grand jury as for contempt and in such a case, so far as we can see, the Court would practically be without any discretion in the premises and would be obliged to require the witness to answer the questions under penalty of going to jail if he refused to do so and staying there until he should betray the confidence that had been reposed in him and, if he had acted conscientiously in publishing facts concerning misfeasance in office of which he believed the public ought to be informed, until he should also betray the public interest and so become unwillingly an agent for helping to conceal rather than to expose and criticise wrongdoing in office.

In such event the United States Attorneys in the several districts would be without power to exercise any independent discretion or to temper what they might know to be oppressive and personal motives of department officials. Section 362 of the Compiled Statutes of the United States provides as follows:

> "The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the

> state and condition of their respective offices, in such time and manner as the Attorney-General may direct."

If what we have said be true, and we see no escape from the logic of it, the result of sustaining the decision of the Court below in this instance would be to arm the executive branch with a most drastic power which so far as can be gathered from the tenor of the Constitution as a whole it was never intended that the executive should have. It would tend at a most important point to break down the separation of powers between the executive and judicial branches of the Government for which the Constitution so carefully provides. In this connection we beg to refer the Court to its decision in the case of *Kilbourn* v. *Thompson*, 103 U. S., 168. The Court in that case held that the House of Representatives exceeded the limit of its authority and assumed a power which could properly be exercised only by the judicial branch in punishing the plaintiff in error for contempt for refusing to obey a *subpœna duces tecum* issued by a committee of the House. The Court in that case referred to the undoubted power of the English House of Commons to punish for contempt in similar circumstances. But it remarked that that power of the House of Commons was derived from the ancient time when the Par-

liament exercised the highest functions of a court of judicature. The Parliament, this court said, was at that time a body which not only enacted laws but also rendered judgment in matters of private right (p. 183). It held that the House of Representatives under our Constitution having had a different origin had never been possessed of a similar power. The Court said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions of each of these branches of government shall be vested in a separate body of public servants and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other" (p. 190). * * *
>
> "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a

> wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature, to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own departments, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them" (pp. 191–192).

We suppose that this Court can take judicial notice of the facts set forth in the official records of the Parliament of Great Britain. If so this Court will find by reference to the Authorized Edition of the Parliamentary Debates, Fourth Series, Volume 186, Column 104, that on the 16th of March, 1908, the Lord Chancellor of England caused to be introduced into the House of Lords a bill which was intended to arm the government with much the same powers that by the subtle device now presented to the consideration of this Court it is now sought to incorporate without public discussion and by more executive fiat into the government of this country. The bill which the Lord Chancellor sought to in-

troduce in the English Parliament provided in its first section as follows:

> "(1) If any person, without authority given on behalf of his Majesty, publishes or communicates to any other person any document or information to which this Act applies, that person shall, if the jury are of opinion that the document or information ought not, in the interests of the State, to have been so published or communicated, and that the person charged knew, or ought to have known, that the document or information ought not to be so published or communicated, be guilty of a misdemeanor, and shall on conviction be liable to imprisonment, with or without hard labor, for a term not exceeding one year, or to a fine, or to both imprisonment and fine".

It will further appear from the records of the English Parliament that this proposal met with such opposition from public opinion as reflected in the Press that the Lord Chancellor, acknowledging the justice of the criticism and saying "we all desire to preserve the freedom of the press and the freedom of publication as much as any of our ancestors", did not press the bill and it was allowed to die.

Parliamentary Debates, 4th Series, Volume 188, Column 673, Volume 190, Column 1478.

We do not believe that there is any democratic government in the world in which the executive branch is armed with any such power that might be used for the suppression of information concerning the acts of public officials as would result in this country if the proposed pardon now under review were held to be valid. The government of the German Empire is founded upon principles which are in many respects antagonistic to those of the Constitution of the United States, yet even in that country we are informed the government, although it has been greatly displeased at times by the publication of official documents and of other information concerning the acts of its various departments, has been afraid on account of the pressure of public opinion to take the extreme means which would be necessary to prevent such disclosures. It has, however, proceeded to lengths which ought not to be emulated in this country, and it is a matter of contemporaneous history, more or less widely known, that a publication in Berlin known as "*Vorwaerts*" used to keep a member of its staff, with the nominal title of editor, whose sole duty it was to assume the responsibility of the publication of disclosed documents and to undergo sentences of imprisonment without hard labor for terms ranging from three weeks to three months or even for a year, for so doing.

The First Amendment to the Constitution of

the United States provides that Congress shall make no law abridging the freedom of speech or of the press.

In his work on Constitutional Limitations (Sixth Ed.) Judge Cooley says, referring to the First Amendment:

> "The privilege which is thus protected against unfriendly legislation by Congress, is almost universally regarded not only as highly important, but as being essential to the very existence and perpetuity of free government" (p. 510).

In the same chapter the same learned writer uses other language which seems very pertinent to the present discussion:

> "At the common law, however, it will be found that liberty of the press was neither well protected nor well defined." * * * "The government assumed to itself the right to determine what might or might not be published; and censors were appointed without whose permission it was criminal to publish a book or paper upon any subject. Through all the changes of government, this censorship was continued until after the Revolution of 1688, and there are no instances in English history of more cruel and relentless persecution than for the publication of books which now would pass unnoticed by the authorities. To a much later time the press was not free to publish even the current news of

the day where the government could suppose itself to be interested in its suppression. Many matters, the publication of which now seems important to the just, discreet, and harmonious administration of free institutions, and to the proper observation of public officers by those interested in the discharge of their duties, were treated by the public authorities as offenses against good order, and contempts of their authority. By a fiction not very far removed from the truth, the Parliament was supposed to sit with closed doors. No official publication of its debates was provided for, and no other was allowed. The brief sketches which found their way into print were usually disguised under the garb of discussions in a fictitious parliament, held in a foreign country. Several times the Parliament resolved that any such publication, or any intermeddling by letter-writers, was a breach of their privileges, and should be punished accordingly on discovery of the offenders. For such a publication in 1747 the editor of the 'Gentleman's Magazine' was brought to the bar of the House of Commons for reprimand, and only discharged on expressing his contrition. The general publication of parliamentary debates dates only from the American Revolution, and even then was still considered a technical breach of privilege" (pp. 513–514).

* * * * *

"It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; *and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship*" (p. 516).

* * * * *

"An examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guarantees relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means

> of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose; and there was no design or desire to modify the rules of the common law which protected private character from detraction and abuse, except so far as seemed necessary to secure to accused parties a fair trial. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens" (pp. 517-518.)

In the foregoing quotations the italics are ours and we would refer with special emphasis to the words to the effect that the liberty of the press means "only that liberty of publication without the previous permission of the government which was obtained by the abolition of the censorship." We believe it would have been a shock to the founders of our government and the makers of our Constitution if it had been pointed out to them that under the Constitution which they had drafted this forbidden censorship of the press could in effect be revived by a simple act of the chief executive performed in the ostensible exercise of the power to grant pardons.

Nothing that we have said herein is intended

to cast any reflection by innuendo or otherwise upon the good motives of the Chief Executive of the United States, but we respectfully urge that the situation is one which calls for direct words frankly spoken. It is no answer to these arguments to suggest that the executive branch could be trusted not to use the pardoning power in such instances for purposes that would be unreasonable or oppressive. That is not the theory upon which free institutions were built or by the application of which they can be preserved. We respectfully but firmly urge that while this case can be and should be disposed of adversely to the contention made on behalf of the government upon the grounds urged in our main brief, nevertheless the additional considerations which we now present are pertinent. The case involves the question whether newspaper editors may be terrorized by fear of being called before the grand jury and compelled to give the sources of information received by them about the acts of officials which has not been vised by the head of the department. *The result of sustaining the decision of the Court below would be to furnish the executive officers of the government with the inquisitorial and punitive powers of a criminal court for enforcing their own regulations relative to giving information to the public about their own acts.* Such a decision we believe would have far-reaching and, unless remedied, disastrous effects.

Furthermore, it is difficult to see in what manner the situation could be remedied. Congress would have no power to impose limits upon the exercise of the pardoning power and it is doubtful whether anything short of an amendment to the Constitution would be effective to prevent the establishment of a bureaucratic censorship similar to that maintained in the undemocratic governments of the Old World.

For these reasons, in addition to those before urged, it is submitted that the decision of the Court below should be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE BURDICK, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 471.
WILLIAM L. CURTIN, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 472.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASES.

The statement of these cases in the brief for the plaintiffs in error is sufficiently accurate and complete except that it should be added that, after the District Court, on February 27, 1914, adjudged the defendants to be in contempt and imposed sentence upon them, they were again summoned before the grand jury and afforded an opportunity to

purge themselves by testifying, but that they persisted in their refusal to testify (Records, p. 2). Orders committing each of the defendants for contempt were thereafter made (Burdick, R. 46; Curtin, R. 40).

The question presented is whether the unaccepted tender to a witness of the President's warrant of pardon for offenses against the United States, of which the witness has not, however, been convicted, and which he does not admit, has the effect of tolling his constitutional privilege against self-crimination.

ARGUMENT.

I.

The President has the power to pardon a person for an offense of which he has not been convicted.

In England, as shown in the opinion of the court below, the power of the Crown to grant a pardon before conviction was recognized at an early date. Lord Coke says expressly that the royal prerogative extended as well before as after "attainder, sentence, or conviction." 3 Inst. 233, ch. 105, Of Pardons. Two pardons by Edward I of indicted, but not yet convicted, men are given in full on pages 234, 235. Blackstone, volume IV, chapter XXVI, subdivision IV, 4, gives a pardon as a special plea in bar to an indictment and, rather strangely, in view of later practice, observes that they are good "as well after as before conviction." Later, in chapter XXVIII, he notes the advantage to the

defendant of pleading a pardon in arrest of judgment, in that it avoided the attainder of felony. Chapter XXXI deals with reprieves and pardons, and subdivision II, 1, shows clearly that pardons before conviction were valid except in impeachments, where they were, however, valid after conviction. And in 6 Halsbury's Laws of England, page 404, it is said: "Pardon may, in general, be granted either before or after conviction."

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. The instances are collected in an opinion of President Taft, while Solicitor General, Opinions of the Attorney General, volume XX, pages 339 *et seq.* And in *Ex parte Garland*, 4 Wall. 333, while the decision did not necessarily depend upon the validity of a pardon which the President had granted Garland, who had never been convicted, Mr. Justice Field, in delivering the opinion of the court, said that the constitutional power of the President to grant pardons (p. 380)—

> extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

This language was quoted with approval in the case of *Brown* v. *Walker*, 161 U. S. 591, both in the prevailing opinion (p. 601) and in the dissenting opinion by Mr. Justice Field (p. 638).

In the constitutions of some of the States the power of the governor to grant pardons is expressly limited by the words "after conviction," but in the States in which this limitation is not contained in the constitutions the governor may pardon before conviction. *Dominick* v. *Bowdoin*, 44 Ga. 357; *Grubb* v. *Bullock*, 44 Ga. 379; *Com.* v. *Bush*, 2 Duv. (Ky.) 264; *State* v. *Woolery*, 29 Mo. 300.

II.

A pardon may be granted for an offense which has neither been admitted nor proved.

It is, of course, true that a pardon can not be granted as a license for future misdoing, for that would, in effect, be an invasion of the legislative power to render lawful in the future that which is now unlawful.

But the pardons involved in the cases at bar do not relate to future offenses, but to offenses which the plantiffs in error have "committed or may have committed, or taken part in."

It is well settled that a pardon may be granted before conviction, and there is no authority whatever which limits the exercise of this power to cases in which the person pardoned has confessed his guilt; the pardon may be granted even though he denies the offense. Indeed a belief in the innocence of the person pardoned is a familiar reason for granting pardons before, as well as after, conviction.

And it is yet more certain that a person may be pardoned for an offense which has not been proved. Saying that a pardon can be granted only where there is proof that an offense has been committed by the person pardoned is equivalent to saying that a pardon can not be granted until the person pardoned has been convicted, for, it can not be said, legally speaking, that a person has committed an offense until he has been convicted of that offense.

It is submitted that an acknowledgment by the person pardoned that his answer will tend to incriminate him is basis enough for granting a pardon, without any other proof of the offense or of his connection with the offense. This is the basis of immunity statutes.

III.

A pardon may be granted for the purpose of affording to a witness immunity from prosecution.

These pardons were granted, as the recitals therein show, for the purpose of making available the testimony of the plaintiffs in error, notwithstanding their constitutional privilege, by affording them absolute immunity against future prosecutions for any past offense concerning which they may be questioned, and it is argued that the exercise of the pardoning power of the President for this purpose amounts to a usurpation of legislative functions.

It is true that it is within the powers of Congress to enact laws securing to witnesses immunity from prosecution in lieu of the constitutional prohibition

against compelling incriminating testimony. In *Brown* v. *Walker*, 161 U. S. 591, wherein a statute of this kind was upheld, Mr. Justice Brown, in delivering the prevailing opinion, said (p. 601):

> The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty and belongs to a class of legislation which is not uncommon either in England (2 Taylor on Evidence, §1455, where a large number of similar acts are collated) or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty.

But the exercise of this power by Congress can have no effect in limiting the constitutional power of the President to grant pardons. The President's power of pardon "is not subject to legislation," and "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders." *United States* v. *Klein*, 13 Wall. 128, 141. It can not be interrupted, abridged, or limited by any legislative enactment. *The Laura*, 114 U. S. 411, 414. Similar language is employed in *Ex parte Garland*, 4 Wall. 333, at page 380.

Since Congress can not restrict the power, and since the Constitution imposes no limitation upon

the exercise of the power, except that cases of impeachment are excluded, it follows that, with this single exception, the power is plenary and may be exercised upon any ground and for any purpose which the President may regard as sufficient to call for its exercise.

And, since the Constitution which confers this power upon the President also provides that "he shall take care that the laws be faithfully executed," it seems that there can be no question but that the President may extend immunity to witnesses by the exercise of the power to pardon.

Indeed this has perhaps never been doubted; it appears that the only question that has been made is whether the power vested in the President is exclusive. *Brown* v. *Walker*, 161 U. S. 591, 601.

And, whatever may have been the view which was at one time taken by the English judges, there is now no doubt but that a witness can not set up his constitutional privilege if he has been pardoned for the offense in regard to which his testimony is sought. *Brown* v. *Walker*, 161 U. S. 591, and English cases cited at page 599. Surely it can not be true that a pardon, granted on one of the usual grounds, such as probable innocence, and with no expectation that the recipient will be called upon to testify, will nevertheless prevent him from invoking the constitutional privilege, but that the same pardon will have no such effect if granted in express contemplation of his appearance as a witness.

IV.

The immunity afforded by the pardons is as broad as the protection afforded by the constitutional provision against compelling a person to be a witness against himself.

The immunity afforded by these pardons is unlike the immunity which was held insufficient in *Counselman* v. *Hitchcock*, 142 U. S. 547, since, by their express terms, they " grant a full and unconditional pardon for all offenses against the United States " which each of the plaintiffs in error " has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing concerning which he may be interrogated in the said Grand Jury proceeding, thereby absolving him from the consequences of every such criminal act." (Burdick, R. 29; Curtin, R. 23.)

The immunity afforded by these pardons is therefore an absolute immunity against future prosecutions for any offense to which the required testimony may relate. This brings these pardons within the scope and effect of the later decisions, which hold that if a statute affords such immunity against future prosecutions the witness will be compelled to testify. *Brown* v. *Walker*, 161 U. S. 591; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Hale* v. *Henkel*, 201 U. S. 43; *Nelson* v. *United States*, 201 U. S. 92.

The contention that these pardons do not afford the protection guaranteed by the Constitution for the reason that they do not protect against prosecutions for offenses against New York or any other State is fully met by what was said in the prevailing opinion in *Brown* v. *Walker,* 161 U. S. 591, 606–608, and by the decisions in the cases of *Hale* v. *Henkel,* 201 U. S. 43, 68, and *Nelson* v. *United States,* 201 U. S. 92, 116. In *Hale* v. *Henkel,* Mr. Justice Brown, in delivering the opinion of the court, said (p. 68):

> The further suggestion that the statute offers no immunity from prosecution in the State courts was also fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas,* 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a State statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to State prosecutions within the same

> jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty.

In every other conceivable respect the protection afforded by these pardons is as complete as that afforded by the statutes which have been held to have the effect of preventing the constitutional privilege from being invoked. Neither the fact that the testimony of the plaintiffs in error may expose them to disgrace, nor the fact that they may be put to the annoyance and expense of having to plead their pardons in bar of subsequent prosecutions, is a valid objection to giving effect to the immunity which is afforded by the pardons. *Brown* v. *Walker*, 161 U. S. 591, 598, 608.

In one respect the plaintiffs in error are even better protected than if they were compelled to testify before a grand jury by force of an immunity statute. The recitals in the pardons are such that they will be able the more easily to establish their plea of immunity. In *Hale* v. *Henkel*, 201 U. S. 43, Mr. Justice Brown, in delivering the opinion of the court, said (p. 68):

> The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some

matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

V.

No formal acceptance is necessary to give effect to the pardons.

The only authority cited by the plaintiffs in error in direct support of the proposition that a pardon is not valid unless accepted by the person pardoned is the case of *United States* v. *Wilson*, 7 Peters 150.

But that the decision in that case has no application to the cases at bar is clearly shown by the re-

view of the decision in the case of *In re Callicot*, 8 Blatchf. 89, wherein Woodruff, J., in refusing a writ of habeas corpus where the prisoner had been unconditionally pardoned and was no longer restrained, said, in part (pp. 96–97):

> It is urged that a pardon is inoperative until accepted, and that it does not affirmatively appear that this petitioner has accepted the pardon. The opinion of Chief Justice Marshall in *The United States* v. *Wilson*, 7 Pet. 150, is referred to. The decision in that case settles nothing upon the question whether, where an unconditional pardon is granted, which the grantee refuses to accept, he can, nevertheless, allege that he is restrained of his liberty while the pardon remains unrevoked and ready for his acceptance at any moment he pleases, he having notice thereof. The decision and all that was said by the venerable and learned Chief Justice may be assumed without abatement or qualification; but the circumstances of the case and the precise point decided are of some importance when sought to be applied to this motion. There was there no application for a writ of *habeas corpus* nor any claim by the grantee of the pardon that he was held in restraint of his liberty by reason of the offence which the pardon had forgiven. Wilson had been tried and convicted of robbing the mail and putting the life of the carrier in jeopardy on the 26th of November, 1829, and sentenced to suffer death

on the 2d of July, 1830. He also had been indicted for obstructing the mail, and for robbing the mail, without the averment that he put the life of the carrier in jeopardy, by several other indictments, in one of which the robbery was charged to have been committed on the same day as the first named, namely, November 26th, 1829. The President of the United States, on the 14th of June, 1830, pardoned him the crime for which he had been sentenced to death, remitting the penalty, "with this express stipulation, that this pardon shall not extend to any judgment which may be had or obtained against him in any other case or cases now pending before said court for other offences wherewith he may stand charged." Wilson had, on the 27th of May previous, withdrawn his several pleas of not guilty and pleaded guilty to the other indictments, and when, in October following, the Attorney for the United States moved for sentence for those offences the court suggested an inquiry into "the effect of a certain pardon understood to have been granted," &c., and the counsel for Wilson appeared, and, on his behalf, waived and declined any advantage or protection which might be supposed to arise from the pardon referred to; and Wilson, in person, being called upon to say whether he had anything to say why sentence should not be pronounced in the case then before the court, and whether he wished in any manner to avail himself of the pardon referred to, answered that he

> had nothing to say, and that he did not wish, in any manner to avail himself, "in order to avoid sentence in this particular case," of the pardon referred to. Questions were certified to the Supreme Court, and the point decided was that the pardon, not having been brought judicially before the court by plea, motion, or otherwise, ought not to be noticed by the judges or in any manner to affect the judgment of the law.

Since, as was decided in *United States* v. *Wilson*, 7 Pet. 150, a court takes no notice of a pardon unless it is pleaded or in some way claimed *coram judice* by the person pardoned, the plaintiffs in error might refuse the benefit of their pardons should they be prosecuted for the offenses which are covered by the pardons; but that does not affect the validity of the pardons.

The records show that the pardons have been executed, that they have been formally tendered to the plaintiffs in error, that they have been filed with the clerk of the court for the jurisdiction in which the testimony is required, and that they remain at the disposal of the plantiffs in error (Curtin, R. 4, 10–11; Burdick, R. 4, 5, 13–14). This is not denied by them.

The pardons have passed out of the control of the President and of the Executive Department of the Government with the intention that they shall pass to the plaintiffs in error, so that there has been as complete a delivery as it is possible to make, and if they are not irrevocable now they would become

so at the very instant that the required testimony is given.

In these circumstances they afford as complete a protection as does an immunity statute, which, as has been said (*Brown* v. *Walker*, 161 U. S. 591, 601). " is virtually an act of general amnesty," for the compulsory operation of which there is, of course, no necessity of acceptance.

They are as complete a bar to prosecution as would be a general pardon or amnesty, which the President has the power to grant (20 Op. Atty. Gen. 330), and of which there is neither formal delivery nor acceptance.

It is the object of the constitutional privilege to protect the witness from the danger of prosecution for a past offense which his evidence may disclose or to which his evidence may give a clue. But, since that danger has been completely removed by the pardons of which the plaintiffs may avail themselves at any time after the moment of testifying, the constitutional privilege can not be invoked by them, for there is nothing to which it can apply—no danger against which its protecting shield is necessary.

CONCLUSION.

It is submitted that the judgment of the court below should be affirmed.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1914.